Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

CACHE VALLEY ELECTRIC COMPANY,

Petitioner,

v.

STATE OF UTAH DEPARTMENT OF TRANSPORTATION; CHARLES "CHUCK" K. LARSON, its civil rights manager; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY*
**Counsel of Record*
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

1. Whether the race-based preference, adopted by Congress in its federal highway programs, STURAA (§106(c)), ISTEA (§1003(b)) and TEA-21 (§1101(b)), by incorporating definitions utilized in the Small Business Act (15 U.S.C. §637(d)) as the basis for determining which entities are qualified presumptively as Disadvantaged Business Enterprises ("DBEs") and thereby are entitled to race-based preferences in the award of contracts, is severable from those statutes?

2. Whether a subcontractor who demonstrates that it has been subjected to discrimination on the basis of the race by the federal highway program must, in order to demonstrate that its injury is redressable, prove that the DBEs who qualified under the racial presumption would not have qualified for DBE status absent the presumption; or, whether the subcontractor's inability to compete on an "equal footing," due to the racial preference, is sufficient to establish standing?

3. Whether a subcontractor, who cannot qualify for Disadvantaged Business Enterprise (DBE) status because it is not a "small business concern," has standing to challenge the constitutionality of the race-based provisions of §106 (c) of STURRA, §1003(b) of ISTEA, and §1101(b) of TEA-21, as adopted by Congress?

LIST OF PARTIES

Cache Valley Electric Company ("Cache Valley") was Plaintiff in the United States District Court for the District of Utah and Appellant before the United States Court of Appeals for the Tenth Circuit. Cache Valley is a corporation organized under the laws of the State of Utah. Cache Valley has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of Utah and Appellees before the United States Court of Appeals for the Tenth Circuit: the State of Utah Department of Transportation; Charles "Chuck" K. Larson, its civil rights manager; and the United States Department of Transportation.

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, *Cache Valley Electric Co. v. State of Utah Department of Transportation, et al.*, 1998 WL 374932, 149 F.3d 1119 (10th Cir. 1998), which appears at pages App. 1 to App. 13 of the Appendix. The unpublished opinion and order of the United States District Court for the District of Utah, dated March 7, 1997, *Cache Valley Electric v. State of Utah Department of Transportation, et al.*, Civil No. 2:96CV-0062, appears at pages App. 14 to App. 27.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the United States Court of Appeals for the Tenth Circuit on July 7, 1998. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are at issue in this Petition for *Writ of Certiorari*.

STATUTES INVOLVED

The statutes involved in this appeal include: Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act ("STURRA"), 101 Stat. 145 (App. 29 to App. 30); Section 1003(b) of the Intermodal Surface Transportation Efficiency Act ("ISTEA"), 105 Stat. 1919 (App. 30 to App. 34); Section 1101(b) of the Transportation Equity Act for the Twenty-First Century ("TEA-21"), Public Law 105-178 (App. 34 to App. 39); and Section 8(d) of the Small Business Act, 15 U.S.C. §637(d) (App. 41 to App. 47).

STATEMENT OF THE CASE

Cache Valley Electric Company filed this action in the United States District Court for the District of Utah challenging the federal highway DBE program, as set forth in STURAA, ISTEA, and TEA-21, and implemented by federal regulations, and applied by the Utah Department of Transportation ("UDOT"). Cache Valley asserts that the federal highway DBE program violates the right of equal protection guaranteed by the Fourteenth Amendment and the Fifth Amendment. Cache Valley asserts that the federal highway DBE program violates these constitutional guarantees both facially and as applied by UDOT.

Cache Valley filed a Motion for Summary Judgment seeking to permanently enjoin UDOT from further implementation of the federal highway DBE program and to have that program declared unconstitutional for its failure to meet strict scrutiny.[1]

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[1] As this Court held in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995), the standard of review to be applied to all race-based measures (whether federal, state, or local) is that of strict scrutiny. *Id.* at 2112. To survive strict scrutiny, USDOT and UDOT must come forward and carry the heavy burden of demonstrating that the use of race to award federal contracts: (1) serves a compelling governmental interest, and (2) is narrowly tailored to achieve that interest. *Id.* Although several local DBE programs have failed strict scrutiny (see, e.g., Monterey Mechanical v. Wilson 125 F.3d 702 (9th Cir. 1997) (holding, incidentally, that a contractor who was not discriminated against had standing to contest the program because he was required to discriminate against subcontractors), the present case is only the second (after *Adarand*) in the country where a federal court of appeals has been asked to apply strict scrutiny to a federal race-based program. The United States has moved to dismiss *Adarand v. Slater* on grounds of mootness. See, for District Court cases, *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D.C. Colo.

The United States Department of Transportation ("USDOT") intervened in this action and filed a Cross-Motion for Summary Judgment, in which UDOT joined. The District Court issued an order denying Cache Valley's Motion for Summary Judgment and granted USDOT's Motion for Summary Judgment. The District Court held that under *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), Cache Valley must meet the race-neutral element of the DBE program; that is, it must be a "small business concern" as defined by statute, to have standing to challenge the DBE program. Cache Creek can not qualify as a "small business concern."

Cache Valley filed a notice of appeal with the United States Court of Appeals for the Tenth Circuit. The matter was decided in a 2-1 opinion issued on July 7, 1998.[2] The Tenth Circuit held that, although Cache Valley demonstrated an injury causally related to the federal highway DBE program, that injury would not be redressed by a favorable decision for two reasons. First, the disputed racial preferences are severable from the remainder of the federal highway DBE program and thus the program would remain even absent those preferences. Second, Cache Valley provided no evidence that the elimination of the preferences would result in any meaningful

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1997) and *In re Sherbrooke Sodding*, 1998 WL 556314 (D.Minn. 1998) (both holding, in a challenge to § 1003(b) of ISTEA and § 8(d) of the SBA, that the contractor had standing and that these statutes, the same challenged in the case at bar, are unconstitutional because they are not narrowly tailored.)

[2] Judge McWilliams dissenting.

reduction in the number of qualifying DBEs.[3] This Petition for *Writ* of *Certiorari* follows.

STATEMENT OF FACTS

A. The Federal Statutory and Regulatory Scheme.

The Disadvantaged Business Enterprise ("DBE") program, adopted by Congress in the Surface Transportation and Uniform Relocation Assistance Act ("STURRA") and its successors the Intermodal Surface Transportation Efficiency Act (ISTEA) and the Transportation Equity Act for the Twenty-First Century ("TEA-21"), requires that "no less than 10 percent" of federally-funded highway contracts be awarded to contractors that are (1) "small business concerns" and are (2) "owned and controlled by socially and economically disadvantaged individuals." (Section 106(c) of STURRA, 101 Stat. 145-146; Section 1003(b) of ISTEA, 105 Stat. 1919; Section 1101(b) of TEA-21).[4]

STURRA, ISTEA and TEA-21 define "socially and economically disadvantaged individuals" in accordance with Section 8(d) of the Small Business Act, 15 U.S.C. §637(d), which specifies certain races presumed to be socially and economically disadvantaged, stating: "The contractor shall presume that socially and economically

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[3] This is contrary to the evidence in the record before the District Court and the Tenth Circuit. The undisputed evidence was that all the DBE firms in Utah qualified for DBE status because of the federal highway DBE program's racial preference. Thus, the evidence is that if the objectionable race-based aspect of the program were stricken, there would be no DBEs.

[4] This is the same statutory and regulatory program as addressed by the Supreme Court in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995). See, e.g., Justice O'Connor's explanation, 115 S.Ct. at 2102-2104.

disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans." 15 U.S.C. §637(d)(3)(C). STURRA, ISTEA, and TEA-21 further presume that women are socially and economically disadvantaged individuals for purposes of qualifying for DBE status.

Section 1003(b) of ISTEA defines a "small business concern" as one with average annual gross receipts of less than $15,370,000 for the preceding three fiscal years, adjusted for inflation. See §§1003(b)(2)(A) and (B). This amount was increased to $16,600,000 in 1994. See 49 C.F.R. §23.62 (1996) (App. 48); 59 Fed. Reg. 67,367 (Dec. 29, 1994). Section 1003(b) incorporates the SBA's §8(d) definition of "small business concerns owned and controlled by socially and economically disadvantaged individuals."[5] Section 1101(b) of TEA-21 has identical definitions.

Federal regulations for state implementation of the federal highway DBE program require state recipients of federal-aid highway funds, such as the State of Utah and its implementing agency, the Utah Department of Transportation, to have a DBE program in place that sets forth: (1) overall goals for the use of DBEs on federally-funded projects, and (2) contract goals for each specific prime contract for which subcontracting is possible. 49 C.F.R. 23.45(g), 23.64. Prime contractors bidding on federally-funded projects must meet or exceed the DBE contract goals established for that project or demonstrate that they could not meet the goal despite "good faith" efforts to do

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[5] *In re Sherbrooke Sodding*, 1998 WL 556314, *2 (D.Minn.) "ISTEA expired by its terms on September 30, 1997. Its DBE provision, however, still applies to funds obligated, but unspent, from prior fiscal years. ISTEA and its DBE provisions apply to Minnesota's highway construction projects being let in 1998, which rely on fiscal year 1997 funding. These funds, and the ISTEA's DBE provisions, are at issue here." *Id.*

so. 49 C.F.R. 23.45(g), (h); 49 C.F.R. pt. 23, App. A. Federal regulations also set forth the specific and sole manner in which DBEs are to be certified by state recipients of federal-aid highway funds. 49 C.F.R. 23.53.

Federal regulations define "socially and economically disadvantaged individuals" as United States citizens who are: "Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans or Asian Indian-Americans, and any other minorities . . . found to be disadvantaged by the Small Business Administration . . . ." 49 C.F.R. 23.62; 49 C.F.R. pt. 23, Subpt. D, App. C. (App. 50 to App. 51) Small business concerns falling outside the presumed groups can, "on a case-by-case basis," obtain DBE status by demonstrating both social and economic disadvantage, as defined by the federal regulations, by showing by clear and convincing evidence (13 C.F.R. 124.105(c)(1)) (App. 49 to App. 50) that they have been personally disadvantaged by virtue of their membership in a group, and that they have experienced discrimination that has been "chronic," "longstanding," and "substantial." 49 C.F.R. 23.62; 49 C.F.R. pt. 23, Subpt. D, App. C.

B. The Utah Department of Transportation DBE Program.

Under the UDOT DBE program, for each UDOT project financed in whole or in part with federal funds, UDOT sets a goal for the percentage of work to be performed on the project by DBE firms. A prime contractor's bid on a UDOT project is deemed responsive only if the prime contractor either: (1) satisfies the DBE goal set forth by UDOT for that particular project, or (2) certifies that it is satisfying the DBE goal only in part, but is including with its bid documentation of good faith

efforts.[6] Bids not meeting one of these two requirements are determined to be non-responsive and are rejected by UDOT.

UDOT defines a DBE, not on the basis of any independent, case-by-case inquiry, but strictly in accordance with federal regulation, that is, as a "small business concern" that "is owned and controlled by one or more socially and economically disadvantaged individuals" who are United States citizens.[7] UDOT further defines "Socially and Economically Disadvantaged Individuals," as set forth in federal regulations, that is, as United States citizens who are:

a. Native Americans – persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

b. Asian-Pacific Americans – persons having origins from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Territories of the Pacific, and the Northern Marianas; or

c. Hispanic Americans – persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish or Portuguese culture or origin, regardless of race; or

d. Black Americans – persons having origins in any of the black racial groups of Africa; or

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[6] "Good faith efforts" are determined "on a case by case basis" by the UDOT DBE Coordinator and the Assistant Director of UDOT, "whose determination shall be final and conclusive." DBE Bid Conditions, p. 7, part (D)(3).

[7] UDOT expressly conceded before the District Court that it has never made any findings of racial discrimination prior to establishing race-based requirements for DBE participation on UDOT projects.

e. Asian – Indian Americans – persons whose origins are from India, Pakistan, and Bangladesh;

f. Individuals who are found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act.

g. Women within the qualifications set forth in STURRA.[8]

C. The Rejection of Cache Valley Bids on UDOT Projects.

Cache Valley is an electrical contractor that cannot qualify as "socially and economically disadvantaged" because it is owned and operated by a white male. Cache Valley cannot qualify as a "small business concern" because its annual gross receipts exceed that set forth in federal statute.

On two occasions in 1995, Cache Valley submitted the low bid to the prime contractors bidding on two separate UDOT projects. On each occasion Cache Valley was the low bidder by more that $20,000. Cache Valley's bids were rejected. However, electrical subcontracts were awarded, under the requirements of the federal highway DBE program, to a DBE. Both general contractors that rejected Cache Valley's low bid in favor of the higher DBE bids, attested in the District Court that, but for the federal highway DBE program, they would have awarded the electrical subcontracts to Cache Valley.

Jack I. Laub, President of Cache Valley, personally determines which UDOT projects Cache Valley will bid on and has attested that it is his practice to bid on every UDOT job with an electrical component unless the project

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[8] DBE Bid Conditions, Special Provision, App. A., pp. 3-4, part (B)(2).

is prohibitively small and in a remote location. Mr. Laub has attested further that he does not anticipate altering the frequency with which Cache Valley submits bids on UDOT projects and that he intends to bid upon as many UDOT projects as he has in the past.

REASONS FOR GRANTING THE WRIT

I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND DECISIONS RENDERED BY THIS COURT.

A. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH DECISIONS RENDERED BY THIS AND OTHER COURTS AS TO THE TRUE NATURE OF THE FEDERAL HIGHWAY DBE PROGRAM, WHICH IS UNQUESTIONABLY A REMEDIAL RACIAL PROGRAM.

It is unexceptional and beyond dispute that the clearly expressed purpose of the federal highway DBE program is to provide a remedy for past racial discrimination.[9] Every court to rule on this program has so recognized, most significantly this Court in its decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995): "We note, incidentally, that this case concerns only classifications based explicitly on race. . . . " *Adarand*

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[9] The attempt by the Tenth Circuit to read the federal highway DBE program as "race neutral" fails. The Tenth Circuit is confused between a "prophylactic" statute, such as Title VII, which bars racial discrimination, and a "reparational" statute such as the one at issue here. Just as importantly, the federal highway DBE program makes its decisions solely on the basis of race and on no other basis. As a result, the federal highway DBE program violates "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Adarand*, at 115 S.Ct. 2112.

at 115 S.Ct. 2105. As to the reason for the federal highway DBE program, Justice O'Connor writes: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand* at 115 S.Ct. 2117. In fact, by the documents that it submitted to this Court in *Adarand*, the United States admitted that the purpose of the federal highway DBE program is to remedy past racial discrimination. In Appendix B, labeled "Statements in Congress Regarding Racial Discrimination and its Effects on Minority Business Enterprises," the United States set forth 18 pages to show that, in the words of the United States, "Congress was seeking, among other things, to remedy the effects of discrimination against minorities [since Congress] considered testimony. . . . about whether race-conscious remedial measures are needed." *Adarand*, Brief for the Respondents, p. 18a.

While the United States attempted, unsuccessfully, before this Court during *Adarand* to assert that the federal highway DBE program is race neutral, it abandoned that effort on remand.[10] In its appeal of the ruling of the U.S. District Court for the District of Colorado that the federal highway DBE program is unconstitutional, the United States argues that the program's racially remedial character saves it. Brief for Federal Appellants, *Adarand v. Slater*, No. 97-1304, at 24-25 (10th Cir. 1998).

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[10] Whether the Department of Justice views the federal highway DBE program as race neutral is largely irrelevant. What matters is the language of the statute, which is unambiguous, and the intent of Congress, which is clear. See, for example, Appendix B cited above, which sets forth the view of many in Congress who intended to remedy racial discrimination.

The Colorado District Court in *Adarand* recognized that the purpose of the federal highway DBE program is to remediate past racial discrimination, referring to it as a "race-based remedial approach;" how else could the court have found a compelling governmental interest? *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1577 (1997). If the purpose of the federal highway DBE program were not to remedy past racial discrimination, there would have been no compelling interest and the use of race by the program would have been stricken outright.

The holding of the Colorado District Court in *Adarand*, as to the purposes of the federal highway DBE program, is buttressed by the holding of other courts to consider the program. Those decisions that have considered the program and found its purpose to be one of racial remediation include: *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), *cert. den.* 111 S.Ct. 2261 (1991), and *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991).

As a result, the holding of the Tenth Circuit in *Cache Valley Electric Co. v. State of Utah Department of Transportation*, 149 F.3d 1119 (10th Cir. 1998) (*Cache Valley*), that the race-based presumption of the federal highway DBE program is severable from that program is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court and other courts that have considered the question.[11]

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[11] Obviously, conceding that the purpose of a federal program is to remedy past discrimination is not to concede that the program is constitutional. Even a well-intentioned program must survive strict scrutiny. A well-intentioned program may fail the compelling governmental interest test for lack of a factual basis or may fail the narrow tailoring test for being both overinclusive and underinclusive. Cache Valley contends that the federal highway DBE program lacks both the requisite factual predicate and is not narrowly tailored.

The holding of the Tenth Circuit as to the severability of the racial presumption of the federal highway DBE program is not just in conflict with holdings of this Court and other courts that have considered this program, the holding is in conflict with the federal statute itself.[12] Three aspects of the federal highway DBE program demonstrate that the racial presumption is not severable from the program:

(1) the racial presumption is integral to the federal highway DBE program and not merely an appendage; in fact, the presumption is the basis upon which states certify DBEs and the specific parties to whom the benefits of the program are to accrue;

(2) nothing in the text or the plain language of the racial presumption suggests that it is severable; and

(3) the legislative history of TEA-21, which succeeds ISTEA, demonstrates that the racial presumption is not severable from the federal highway DBE program. Of most significance is the fact that, in adopting TEA-21, Congress refused to amend the program to convert it to a race-neutral program.[13]

Since the Tenth Circuit's holding that the racial presumption was severable from the federal highway DBE program was the basis for its holding that the redressability prong of the standing inquiry was not satisfied, the Tenth Circuit's holding as to redressability must fail as well. Since the racial presumption is not severable from the federal highway DBE program, Cache

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[12] There is absolutely no evidence in the record that the racial presumption of the federal highway DBE program is severable.

[13] See *Congressional Record*, Vol. 144, No. 21, S-1395, *et seq.*

Valley has standing to challenge the federal highway DBE program.[14]

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[14] The Tenth Circuit's holding sets forth a series of impenetrable barriers for entities like Cache Valley, which seek to challenge the federal highway DBE program as a violation of the equal protection guarantee of the Constitution. Cache Valley and other challengers must show, not only that they have been injured by the federal highway DBE program and its racial presumption as a result of their inability to compete on an equal footing, but also that they meet the "small business concern" definition. Yet even that is not enough given the Tenth Circuit's holding that the racial presumption may be severed from the federal highway DBE program. That holding necessitates that Cache Valley and other challengers prove that, in the absence of the racial presumption, there would be fewer DBEs with whom Cache Valley, for example, must compete.

Even if this analysis were correct and it is not correct in light of *Adarand*, *Jacksonville*, *Bakke*, and other holdings of this Court, it is fatally flawed since the Tenth Circuit engages in the very presumptive behavior that it asserts is being "severed." By requiring Cache Valley to prove that fewer DBEs would be certified in the absence of the racial presumption, the Tenth Circuit presumes that all the DBEs are "socially and economically disadvantaged" unless and until Cache Valley can prove otherwise.

Moreover, the Tenth Circuit's holding that Cache Valley determine which DBEs have benefited from the racial presumption or are "not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups," is exactly the contention of the United States in *Adarand v. Pena*. See, Brief for the Respondents, p. 16, citing 49 C.F.R. Pt. 23, Subpt. D, App. C ¶2. As was made clear regarding Adarand (see, *Adarand*, Petitioner's Brief, p. 24, n. 21.), Cache Valley is in the business of performing electrical work on highway projects, not challenging the social and economic status of DBEs. Even if Cache Valley had the time, energy, and staff to challenge the status of DBEs (which it does not), it has no subpoena power and no ability to obtain the data upon which basis to challenge the certification of those DBEs.

That conclusion is supported further by three holdings of the Supreme Court with which the holding of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict. Those decisions include: *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995); *Northeastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Adarand and *City of Jacksonville* establish the principle that a contractor suffers an injury in fact, and thus has standing to challenge a race-based program, if it is unable to compete on an equal footing because of such a program. *Bakke* stands for the proposition that an individual bringing an equal protection challenge need not meet any economic requirements to have standing to challenge the race-based provisions.

Since the holding of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the holding of this Court in *Adarand*, regarding the nature of the federal highway DBE program, this Court should grant this petition to resolve this conflict.

Worse yet, should Cache Valley challenge an entity's DBE status, it would expose itself to civil litigation for maintaining that an entity was a fraudulent DBE, a felony.

The holding of the Tenth Circuit is constitutionally flawed, as are the federal regulations on the subject, for placing the burden on Cache Valley and other "third parties" to determine whether those entities that obtain special, race-based benefits from a federal program are entitled to those benefits.

B. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN *ADARAND V. PENA*, IN WHICH THIS COURT HELD THAT A SUBCONTRACTOR WHO IS UNABLE TO MEET THE RACIAL PRESUMPTION HAS STANDING TO CHALLENGE THAT PRESUMPTION.

In *Adarand*, the Supreme Court held, under facts identical to the present case and involving this very statutory and regulatory program, that a subcontractor had standing to challenge the award of construction contracts on the basis of race under the federal highway DBE program. *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2101-2104 (1995). Since the program challenged here is the same program as the program challenged in *Adarand*, in both cases, anyone qualifying for the federal highway DBE program preference must be both: (1) "socially and economically disadvantaged," and (2) a "small business concern."

Without addressing or determining whether Adarand could qualify as a "small business concern," the Supreme Court held that Adarand had standing because it had demonstrated that it had, historically, and would, in the future, bid on contracts with DBE requirements, thus being compelled to compete for these contracts with DBEs. In so holding, the Court specifically rejected a claim made by the United States that foreshadowed the holding of the Tenth Circuit: "Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' " *Adarand*, 115 S.Ct. at 2105, citing *Northeastern Fla. Chapter of the Associated General Contractors of America v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 2304 (1993).

The Tenth Circuit in *Cache Valley* brushed aside the holdings of *Adarand* and *Jacksonville* by assuming that the Court in these cases did not consider the issue of severability, implying that if it had, it would have dismissed *Adarand*, opining that "although *Adarand's* definition of injury necessarily impacts whether a plaintiff will be able to demonstrate traceability and redressability, *Adarand* offers no analysis on these points, instead merely stating 'that Adarand has standing to bring this lawsuit.' Thus, although the plaintiff in *Adarand* made a challenge similar to [Cache Valley's], the *Adarand* Court is silent on what impact the severability of the disputed preferences and the existence of race- and gender-neutral criteria have on the analysis of traceability and redressability." *Cache Valley*, App. 8. This is a hypothetical leap that is clearly not permissible. One must assume that the Supreme Court considered all legal possibilities when it ruled, in cases identical in all material respects to this case, that those challenging the statutes had standing to do so.

Since the holding of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the holding of this Court in *Adarand*, this Court should grant this petition to resolve the conflict.

C. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN *NORTHEASTERN FLA. CHAPTER OF ASSOC. GEN. CONTRACTORS V. CITY OF JACKSONVILLE, FLA.*, IN WHICH THIS COURT HELD THAT IT IS THE DENIAL OF THE ABILITY TO COMPETE ON AN "EQUAL FOOTING" THAT IS THE INJURY IN FACT IN AN EQUAL PROTECTION CLAIM.

In *Jacksonville*, the Court articulated the following standard for determining injury in equal protection challenges, making clear that standing is satisfied whenever

the playing field is uneven due to any discriminatory barrier:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier *need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.* . . . In the context of a challenge to a set-aside program, *the "injury in fact" is the inability to compete on an equal footing in the bidding process,* not the loss of a contract. . . . *To establish standing, therefore, a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.*

Northeastern Fla. Chapter of Associated General Contractors v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993) (Emphasis added; footnote and citations omitted.).

Significantly, the *Jacksonville* Court found the plaintiff contractor association, which is one step removed from the injury suffered by its individual members, to meet the requirements of standing. To satisfy redressability the Court made clear a plaintiff need show only that the prospect of obtaining relief as a result of a favorable ruling is not " 'too speculative.' " *City of Jacksonville*, 508 U.S. at 663-64 (quoting *Allen v. Wright*, 469 U.S. 737, 752 (1984)). Thus the holding of the Tenth Circuit, that Cache Valley must comply with the impossible burden of showing that there would be a "meaningful" reduction in the number of DBEs in order to prevail in its equal protection claim, is in true, direct, intolerable and irreconcilable

conflict with *Jacksonville*. Under *Jacksonville*, all that Cache Valley must show is that it has been denied the opportunity to compete, in the bidding process, on an "equal footing" as a result of the federal highway DBE program.

The Tenth Circuit in *Cache Valley* attempts to distinguish *Jacksonville* by arguing that it relates only to "set-asides," *Cache Valley*, App. 8. Recently, the U.S. Court of Appeals for the District of Columbia spoke eloquently on such creative dodges of the holdings in *Adarand* and *Jacksonville*:

> Although it was urged [in *Adarand*] that such "goals" should be treated differently than obligatory set-asides, the majority did not even pause to consider this argument. Similarly, we do not think it matters whether a government-hiring program imposes hard quotas, soft quotas, or goals.

Lutheran Church-Missouri Synod v. F.C.C., 141 F.3d 344, 354 (D.C. Cir 1998).

Likewise, the Ninth Circuit, in *Monterey Mechanical v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997) rejected this interpretation of *Jacksonville*:

> The state argued that a challenger lacks standing because of the absence of rigid requirements. We held that the provisions were not "immunized from scrutiny because they purport to establish goals rather than quotas." *Bras v. California Public Utilities Commission*, 59 F.3d 869, 874 (9th Cir. 1995). *We construed Northeastern Florida Contractors [v. Jacksonville]* to mean that "the relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Bras*, 59 F.3d at 875. *Bras* controls. In the case at bar, the statute does not require set asides, but it encourages them. . . . The Tenth Circuit has reached the same conclusion in an indistinguishable case,

> *Concrete Works of Colorado v. Denver*, 36 F.3d, 1513 (19th Cir. 1994). . . . We have no basis for setting up an intercircuit conflict on this settled issue.

Since the holding of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the holding of this Court in *Jacksonville*, this Court should grant this petition to resolve this conflict.

D. THE DECISION OF THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE* IN WHICH THIS COURT HELD THAT AN INDIVIDUAL CHALLENGING A RACE-BASED PREFERENCE PROGRAM NEED NOT MEET ANY ACCOMPANYING ECONOMIC QUALIFICATIONS.

In *Bakke*, the Court held a plaintiff need not be "economically disadvantaged" to have standing to challenge a program of economic disadvantagement, which was intended, like the one at bar here, to make up for alleged past racial discrimination. *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 (1978). *Bakke* involved a challenge to a medical school admissions program that gave preferences to applicants who were "economically and/or educationally disadvantaged." *Id.* at 274, n.4. Bakke's standing was challenged because he was not "economically and/or educationally disadvantaged." *Id.* at 281 n.14.

The Supreme Court rejected this challenge to Bakke's standing holding:

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. *The constitutional element of standing is plaintiff's demonstration of any injury to*

> *himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. . . . Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant.* Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. *Id.* (Emphasis added; citations omitted.)

Bakke thus establishes that a plaintiff need not demonstrate he or she is eligible to participate in a race-preference program to have standing to challenge that program. The Supreme Court made clear in *Bakke* that the injury in an equal protection challenge is the preclusion of equal competition due to what amounts to a racial classification. *Id.* In *Bakke*, the court held that the program was simply "a minority enrollment program with a secondary disadvantage element." *Bakke* at 438 U.S. 281.[15] The facts relevant to Bakke's standing are indistinguishable from the present case and under the holding of *Bakke*, Cache Valley has standing.

Since the holding of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the holding of this Court in *Bakke*, this Court should grant this petition to resolve this conflict.

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[15] "Economically disadvantaged" individuals are a subset of the racially defined "socially disadvantaged groups." 15 U.S.C. § 637(a)(6)(A); see, also *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) ("the statute treats the concept of economic disadvantage as a subset of social disadvantage, not vice versa. . . . In this respect, the 8(a) provisions are much like the program in *Bakke*: 'a minority enrollment program with a secondary disadvantage element.' "

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND DECISIONS RENDERED BY OTHER FEDERAL COURTS OF APPEALS.

A. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISION RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *DYNALANTIC CORP. V. DEPARTMENT OF DEFENSE.*

1. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISION RENDERED IN *DYNALANTIC* THAT IT IS THE DENIAL OF THE RIGHT TO COMPETE ON AN EQUAL FOOTING THAT CONFERS STANDING IN AN EQUAL PROTECTION CHALLENGE.

In *Dynalantic*, the Dynalantic Corporation sued the Department of Defense and the Small Business Administration seeking to enjoin the procurement, under the government's Section 8(a) contract set-aside program, of a flight simulator contract for which Dynalantic wished to bid.[16] In *Dynalantic*, the plaintiff contractor was, like Cache Valley, too large to qualify as a small business.

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[16] While *Dynalantic* is a Section 8(a) program, rather than 8(d), which is at issue here, the definitions of social and economic disadvantage used in 8(d) are derived from and incorporate the definitions of the same terms in 8(a), and the program is in all respects identical, for purposes of the analysis here, to 8(d), particularly in the selection and qualification of DBEs, whether under the presumptions, which are identical, or otherwise.

On the issue of whether Dynalantic must qualify for the program from which it seeks protection, the government argued at the District Court that Dynalantic lacked standing because it did not have an injury traceable to the alleged wrong. Specifically, the government argued that because Dynalantic never sought, nor could qualify for a §8(a) contract, even if the race-conscious element were set aside (Dynalantic was neither "economically" nor "socially" disadvantaged), the government's §8(a) program caused Dynalantic no injury. *Id.* at *4. (This is exactly the holding of the District Court and the Court of Appeals regarding Cache Valley.)

Although Dynalantic, like Cache Valley, contended that it had standing because it was injured by its inability to bid for contracts procured under the program, the District Court adopted the government's position. The District Court held that Dynalantic did not have Article III standing to challenge the constitutionality of the Section 8(a) program and dismissed the case. On appeal the District of Columbia Circuit reversed, held that Dynalantic did have standing, and found that the District Court had mischaracterized Dynalantic's injury:

> We think this argument is premised on a mischaracterization of Dynalantic's alleged injury. [Dynalantic] has no desire to participate in the 8(a) program. . . . Rather, Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms. Dynalantic alleges that "it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). See also *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2104-05 (1995); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992). Nor of course does

> Dynalantic need to demonstrate that it actually would have won (or will win) the award of a particular contract. See *Adarand*, 115 S.Ct. at 2105 (citing *City of Jacksonville*, 508 U.S. at 666). Dynalantic's injury is "the inability to compete on an equal footing in the bidding process, not the loss of a contract" *City of Jacksonville*, 508 U.S. at 666. Dynalantic's allegation that the 8(a) program causes a not insignificant portion of its potential business opportunities to be foreclosed to it clearly makes out an injury. *Dynalantic*, 1997 WL 306475, at *3-4.

More specifically, on the issue of whether Dynalantic must be socially and economically disadvantaged, without the presumption, the court held, at 1016:

> The government claims that this case is analogous because Dynalantic, as not economically or socially disadvantaged (without the presumption, would not qualify for the 8(a) program even if the race-conscious elements were removed. . . .
>
> *Dynalantic, as we have noted, does not seek to qualify for the 8(a) program, so whether it could not meet the non-race-conscious requirements is wholly irrelevant.* . . . Appellant . . . claims that the *entire* 8(a) program . . . is infected by unconstitutional race consciousness and therefore its constitutional claim is not logically distinct from its injury. (Emph. supp.)

Like *Dynalantic*, Cache Valley's ineligibility to qualify as a socially and economically disadvantaged business due to its annual revenues is not relevant to the standing analysis. Like *Dynalantic*, Cache Valley's demonstration that the federal highway DBE program prevents it from competing on "equal footing" in the bidding process foreclosing potential business opportunities, establishes an injury traceable to the federal highway DBE program, an injury that is redressable by injunction. As a result,

Cache Valley has standing. Like the District Court in *Dynalantic*, the District Court and the Tenth Circuit in *Cache Valley* "mischaracteriz[ed]" Cache Valley's injury.[17]

2. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISION RENDERED IN *DYNALANTIC* THAT A RACIAL PRESUMPTION PROVISION CONTAINED IN A REMEDIAL RACIAL STATUTE MAY NOT BE SEVERED.

The government argued in *Dynalantic* that the racial presumption of the statute was severable. The *Dynalantic* court held it was not. The court considered the statutes, considered *Bakke*, which it felt was largely dispositive of the issue, and held, at 115 F.3d at 1017:

> Given these explicit statutory references to race, we do not think we can assume, certainly at this stage of the litigation, that the statute itself [without the presumption][18] is invulnerable. *Nor can we assume that Congress would have enacted 8(a) without its race-conscious theme or that it would, if the statute were held unconstitutional,*

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[17] The Court of Appeals' decision in *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344 (D.C. Cir. 1998) raises another issue applicable to standing here. There an entity not harmed by the racial preference was allowed standing to raise the rights of those persons harmed, the persons not hired. Under the holding, when constitutional rights are at risk, a third party may raise those rights. The Tenth Circuit's holding that Cache Valley, which was harmed directly, does not have standing, is in direct conflict with the holding in *Lutheran*, which permits standing even for third persons.

[18] In the Section 8(a) program, the racial presumption is entirely regulatory, being set out in the Code of Federal Regulations. In the 8(d) program, incorporated by ISTEA and TEA-21, the presumption is even more integral and is less capable of severance because it is statutory.

> *commit itself to a program of the same scale directed only to the economically disadvantaged without regard to race.* In any event, *if a favorable decision would lead only to the invalidation of the regulations, as we have explained, Dynalantic's injury would still be considerably mitigated.* (Emph. supp.)

Thus, the *Dynalantic* court was not convinced, as the *Cache Valley* court was, in a one sentence discussion of the subject, that the remaining program after severance of the racial presumption was race-neutral. Rather, *Dynalantic* held that it was still a race-based program, as it must be because of its reparational purpose, unlike truly race-neutral statutes, such as Title VII, which are prophylactic in nature.

3. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISION RENDERED IN *DYNALANTIC* THAT IF THE PRESUMPTION WERE SEVERED, THERE WOULD BE NO REMEDIATION.

Furthermore, not only is *Dynalantic* in direct opposition to *Cache Valley* on the issue of severance of the presumption and the need to be economically disadvantaged, it is in direct opposition on the issue of redressability after severance, holding at 1016-1017:

> With simply a goal, however, *we cannot assume that there would be the same number of 8(a) contractors absent the allegedly illegal provisions.* Of the approximately 5,700 firms currently in the 8(a) program, only about two dozen – less than one-half of one percent – have qualified by demonstrating to the SBA by "clear and convincing evidence," 13 C.F.R. §124.105(c)(1), that they are socially disadvantaged; thus, *over 99% of the firms qualified as a result of race-based presumptions.* That means that *99% of those companies that*

> *have a preferred position to appellant* in competing for Defense Department contracts received an allegedly illegal boost to put them in the preferred category. *It seems more than likely that without the regulatory presumption there would be considerably fewer 8(a) contractors, for such contractors would have to make by "clear and convincing evidence" the showing required by 13 C.F.R. §124.105(c)(1), including that the disadvantage has been personally felt and has impacted their entry into the business world.*[19] ***Appellant would thus suffer a considerably lessened injury****: a smaller number of 8(a) firms means a smaller number of contracts procured under the 8(a) program.*

Like the 8(a) program, USDOT's program certified the vast majority of its DBEs using the racial presumption. The specific statistics were before the Tenth Circuit in the Appendix to Cache Valley's brief, to which were attached the DBE directory, which constituted the list of DBEs that had been qualified. In that list, there were only women and minorities who had qualified as DBEs under the presumption. There were no others who had qualified without the presumption. The *Cache Valley* court, without any evidence on the point, presumes that all minorities are indeed, socially and economically disadvantaged, and that they would be able to prove, one and all, that they suffered from long term, chronic, substantial discrimination. This the Court may not do.

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[19] This is a requirement even less onerous than the one imposed by the similar regulation for 8(d), that is, 49 C.F.R. pt. 23, subpt. D, App. C, "Elements of Social Disadvantage."

B. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISIONS RENDERED BY OTHER FEDERAL COURTS OF APPEALS.

In the following cases, challenging the state application of the federal DBE program, standing did not bar the Plaintiffs: *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992); *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), *cert. den.* 111 S.Ct. 2261 (1991); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991). Thus, the Tenth Circuit opinion in *Cache Valley* conflicts with these decisions as well.

Since the holding of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the holding of the District of Columbia Circuit in *Dynalantic* and the holdings of other Circuit courts in other cases this Court should grant this petition to resolve this conflict.

III. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS RAISES IMPORTANT CONSTITUTIONAL ISSUES OF NATIONAL IMPORTANCE.

On June 12, 1995, this Court issued its landmark decision in *Adarand Constructors, Inc. v. Pena*. In that decision, this Court returned to its historical view regarding the manner in which the equal protection guarantee is to be examined in the face of the use of racial classifications, that is, with skepticism, consistency, and congruence. As a result of that return to the historic view, the Court declared "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand* at 115 S.Ct. 2113.

Thereupon, "[b]ecause our decision today alters the playing field in some important respects," this Court "remand[ed] the case to the lower courts for further consideration in light of the principles we have announced." *Adarand*, 115 S.Ct. at 2118. It is the greatest irony therefore, that the very circuit to which this Court remanded *Adarand* has made it impossible for this "further consideration" to occur. As a result of the Tenth Circuit's holding, anyone who seeks to challenge the federal highway DBE program addressed in *Adarand* lacks standing, under the *Cache Valley* reasoning. Thus, no one will be able to challenge a program which even the *Cache Valley* court admits results in injury to Cache Valley and those similarly situated.[20] As a result of the holding of the Tenth Circuit in *Cache Valley*, a challenger of this program will be held to lack standing based on economic factors, or based on its inability to demonstrate that there will be fewer DBEs with whom it must compete, or based upon the ostensible "severability" of the racial presumption provision. All of these bases conflict with holdings of this Court and with holdings of other federal courts of appeals. But more importantly, the Tenth Circuit holding means that no one has the ability to demand that the lower courts answer the simple question this Court assumed, with its opinion on June 12, 1995, would be answered: is the federal highway DBE program constitutional?[21] The impenetrable barrier the Tenth Circuit has

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[20] "[W]e agree with the district court that plaintiff has demonstrated an injury in 'its inability to compete for government subsidized contracts on an equal footing with businesses classified as DBEs pursuant to the Section 8(a) program.' " *Cache Valley*, App. 8.

[21] "It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand." *Adarand*, at 115 S.Ct. 2119, Scalia concurring. The

erected to prevent that question from being answered is reason enough for this petition to be granted.

Yet, there is another reason. Congress has just extended the DBE program for another six years. As have its three predecessors, TEA-21 requires the USDOT to set aside not less than ten percent of the amount authorized for small businesses owned by socially and economically disadvantaged individuals. Congress did so on the explicit assurance of the U.S. Department of Justice that the federal highway DBE program challenged in *Adarand* is constitutional![22] For the past sixteen years, nearly identical provisions have forced literally every state and nearly five hundred metropolitan areas to favor certain citizens while disfavoring others and to do so because of their race.

Under the Constitution, however, it is not the role of Congress to resolve this issue. That is clear from the debate regarding TEA-21, during which some members of Congress expressed the view that the federal highway DBE program is unconstitutional, whereas others asserted that it is constitutional, by deferring to the Executive.[23] Nonetheless, Congress adopted TEA-21, the

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Tenth Circuit's holding in *Cache Valley* demonstrates that Justice Scalia's optimism was unwarranted.

[22] See, for example, the letter from Attorney General Reno and Secretary Rodney Slater to U.S. Senator Pete Domenici. App. 52 to App. 59.

[23] Ironically, while Congress recognized that resolving the constitutionality of the federal highway DBE program as soon as possible is of national importance, the Tenth Circuit has rendered such a resolution impossible. If the constitutionality of this program is to be determined and if the holding of this Court in *Adarand* is to be applied, this petition must be granted.

largest public works act in the nation's history.[24] TEA-21 authorizes the expenditure of more than $214,000,000.00 over the next six years, while preserving unchanged the federal highway DBE program challenged in *Adarand* and in *Cache Valley*. Whether that program is constitutional manifestly is a question of great national importance.

Since the decision of the Tenth Circuit raises constitutional issues of great national importance, this Court should grant this petition to resolve these issues.

CONCLUSION

For all of the above reasons, this Court should grant the petition of *Cache Valley* in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
**Counsel of Record*
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

Dated: October 5, 1998

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[24] TEA-21 applies to all local entities with a population exceeding forty thousand persons, and which receive federal highway funds from the U.S. government.

CACHE VALLEY ELECTRIC COMPANY,
a Utah corporation,
Plaintiff-Appellant,
v.
STATE OF UTAH DEPARTMENT OF TRANSPORTATION **and Charles K. "Chuck" Larson, its civil rights manager,**
Defendants-Appellees,
United States Department of Transportation,
Defendant-Intervenor-Appellee.

No. 97-4042.

United States Court of Appeals,
Tenth Circuit.

July 7, 1998.

George A. Hunt (Carolyn Stevens Jensen appearing with him on the briefs), Williams & Hunt, Salt Lake City, Utah, for Plaintiff – Appellant.

Rebecca K. Troth (Isabelle Katz Pinzler, Acting Assistant Attorney General, Mark L. Gross, Lisa J. Stark, Attorneys, on the brief), Washington, DC, for Defendants.

Before BRISCOE, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and LUCERO, Circuit Judge.

LUCERO, Circuit Judge.

Cache Valley Electric Company ("CVE"), a Utah corporation that regularly bids on electrical contracts let by the Utah Department of Transportation ("UDOT"), sued the United States Department of Transportation ("DOT"),

UDOT, and Charles K. Larson, UDOT's civil rights manager,[1] seeking to enjoin further operation of the Disadvantaged Business Enterprise ("DBE") program because of its use of racial and gender preferences. We affirm the district court's determination that CVE lacks standing to bring the present action.

I

Through the DBE program, it has been the longstanding policy of the United States Department of Transportation to expend "not less than 10 percent of the amounts authorized to be appropriated" for certain federal highway programs "with small business concerns owned and controlled by socially and economically disadvantaged individuals." Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. No. 102-240, § 1003(b)(1), 105 Stat. 1914, 1919 (1991) ("ISTEA"); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145 (1987) ("STURAA"). As a recipient of funds from the United States Department of Transportation for use in DOT-assisted contracts, UDOT is required to maintain an approved DBE program. *See* 49 C.F.R. § 23.41(a)(3). In this regard, UDOT establishes an annual overall DBE participation goal for UDOT projects financed with federal funds, and, to achieve that goal, identifies which projects

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[1] Larson was sued in his official capacity only. *See* Appellant's App. at 2.

have subcontracting opportunities for DBEs and determines the appropriate DBE participation goal for each. *See* Appellant's App. at 284.

To qualify to participate in the DBE program, a business must be both "small," *see* ISTEA § 1003(b)(2)(A) (stating that no entity may qualify as DBE if its "average annual gross receipts over the preceding 3 fiscal years" exceeds $15,370,000); 59 Fed.Reg. 67,367, 67,367 (1994) (increasing the revenue limit to $16,600,000 to adjust for inflation), and "owned and controlled by socially and economically disadvantaged individuals," *id.* § 1003(b)(1). Both the ISTEA and its predecessor statute, the STURAA, define "socially and economically disadvantaged" in accordance with section 8(d) of the Small Business Act ("SBA"), *see* 15 U.S.C. § 637(d), and its implementing regulations. *See* ISTEA § 1003(b)(2)(B); STURAA § 106(c)(2)(B). Under the SBA, "[s]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). Economically disadvantaged individuals are defined as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A).

The statute also establishes a presumption that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" are socially and economically disadvantaged. 15 U.S.C. § 637(d)(3)(C); *see* ISTEA § 1003(b)(2)(B); STURAA

§ 106(c)(2)(B). Both the ISTEA and the STURAA add women to that presumptive group. *See* ISTEA § 1003(b)(2)(B); STURAA § 106(c)(2)(B). Although the presumption is rebuttable, the burden is on the challenging party. *See* 49 C.F.R. §§ 23.62, 23.69; *id.* pt. 23, subpt. D, app. C. Those not entitled to a presumption of social and economic disadvantage may nonetheless attain DBE status by satisfying the race- and gender-neutral criteria established in the regulations. *See* 13 C.F.R. §§ 124.105(c)(1), 124.106; 49 C.F.R. pt. 23, subpt. D, apps. A & C.

Under UDOT's implementation of the ISTEA and relevant implementing regulations, a bid on federal highway projects is deemed responsive only if the requisite percentage of DBE participation is attained or, if that is not possible, by the bidder certifying that good faith efforts were used in an attempt to attain the stated goal. *See* Appellant's App. at 39-40. Under UDOT's scheme, "DBE status must be granted to any DBE contractor by UDOT prior to bid opening." *Id.* at 42.

In the winter of 1995, UDOT solicited bids on two separate projects that would be at least partially funded by the federal government. CVE's owners are not members of groups presumed to be disadvantaged and the company cannot qualify as a DBE because its gross revenues exceed the statutory limit to qualify as a "small" business. CVE submitted the lowest bid to the prime contractor for the electrical work to be done on each of those two projects. In both cases, however, the prime contractor that ultimately won the contract selected the next lowest bid in an attempt to satisfy the DBE percentage goal. Both prime contractors attested that but for the

DBE program they would have used CVE to perform the needed electrical work. CVE filed this action shortly thereafter. The company seeks a declaration that the DBE program is unconstitutional and an injunction prohibiting UDOT from presuming certain minority groups to be socially and economically disadvantaged.

II

The district court ruled that CVE did not have standing to pursue the current action. We review this determination *de novo*. *See Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir.1996). In order to have standing, CVE must demonstrate: (1) an "injury in fact," meaning the "invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct," meaning that the "injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision," meaning that "the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (internal quotations and citations omitted).

In this type of equal protection case, "injury in fact" is defined as "the inability to compete on an equal footing in the bidding process." *Id.* at 666, 113 S.Ct. 2297. "When

the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," a plaintiff establishes injury by showing "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* In addition, to prove its injury is "imminent" such that it may seek forward-looking relief, CVE must make "an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Under this framework, we agree with the district court that plaintiff has demonstrated an injury in "its inability to compete for government subsidized contracts on an equal footing with businesses classified as DBEs pursuant to the Section 8(a) program."[2] Moreover, pointing to the two

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[2] Defendants argue that CVE never challenged the entire program, but only challenged "the manner by which UDOT identifies DBEs." Thus, defendants argue, CVE lacks standing because its annual average gross receipts – $40 million – are well above the statutory threshold for admission into the program. *See* ISTEA § 1003(b)(2)(A); 59 Fed.Reg. at 67,367; *Wilson*, 98 F.3d at 593 ("[A] person who fails to satisfy lawful, nondiscriminatory requirements or qualifications for the benefit lacks standing to raise claims of discrimination in the denial of the benefit."). Although we agree with defendants that CVE would lack standing if all it sought to do was challenge the admission criteria for the DBE program, we cannot construe plaintiff's challenge in so limited a fashion. Its prayer for relief states that the "DBE program on its face and as applied violates the Fifth and Fourteenth Amendments . . . because it utilizes inherently suspect gender and/or racial-based class-

contracts that it lost as a result of the DBE program and relying on its representation that it will continue to apply for UDOT electrical subcontracts in the relatively near future, CVE has also established that its injury is "imminent."

Having defined its injury as the inability to compete on equal footing, plaintiff must also demonstrate that such injury is "fairly traceable" to the disputed conduct of defendants – namely, the use of allegedly unconstitutional race and gender preferences – and that the relief sought – namely, the elimination of the disputed preferences – will provide redress for the injury claimed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "Traditionally, redressability and traceability overlap as two sides of a causation coin." *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1017 (D.C.Cir.1997). Though CVE points to *Adarand* as dispositive on both causation and redressability, we do not find *Adarand* controlling. In *Adarand*, the standing analysis was limited to a detailed discussion of how to demonstrate an injury of sufficient imminence to satisfy standing requirements for forward-looking relief. *See id.* at 210-12, 115 S.Ct. 2097. Although Adarand's definition of injury necessarily impacts

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ifications. . . . " Appellant's App. at 5. Moreover, plaintiff strenuously argued both before the district court and on appeal that its injury is attributable to the DBE program and not to its inability to participate in that program. *See* Appellant's App. at 814; Appellant's Br. at 25. Thus, plaintiff's position is clearly a challenge to the entire program based on its usage of allegedly improper race and gender preferences. To hold otherwise would favor semantics over substance.

whether a plaintiff will be able to demonstrate traceability and redressability, *Adarand* offers no analysis on these points, instead merely stating "that *Adarand* has standing to bring this lawsuit." *See id.* at 212, 115 S.Ct. 2097. Thus, although the plaintiff in *Adarand* made a challenge similar to CVE's, the *Adarand* Court is silent on what impact the severability of the disputed preferences and the existence of race- and gender-neutral criteria have on the analysis of traceability and redressability.[3]

Here, assuming for the sake of argument that plaintiff has established that its injury is "fairly traceable" to the DBE program and its race and gender preferences, it would be pure speculation to conclude that invalidating the allegedly unconstitutional preferences would ameliorate plaintiff's ability to compete in any way. This is true for two reasons. First, the disputed preferences are severable from the rest of the DBE program and thus the program would remain viable even absent those preferences. Second, the plaintiff has adduced no evidence that the elimination of the preferences would result in any meaningful reduction in the number of qualifying DBEs. We therefore must conclude that plaintiff lacks standing

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[3] This is unlike the situation in City of Jacksonville in which 10% of the funds spent on the city's contracts were required to go to minority- and women-owned businesses. *See* 508 U.S. at 658, 113 S.Ct. 2297. When, as there, the set-aside is conditioned solely on race or gender, the definition of the injury as the inability to compete on equal footing makes it explicitly traceable to the disputed preference and the elimination of that preference therefore must redress the injury. *See id.* at 666 n. 5, 113 S.Ct. 2297.

because any anticipated redress from a favorable decision is wholly speculative.

A. Severability

Plaintiff argues that its injury is redressable because eliminating the allegedly unconstitutional presumption will eviscerate the statute. We disagree. "The standard for determining the severability of an [allegedly] unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam)). Here, the basic intent of the operative statute is to foster growth in small businesses owned by "socially and economically disadvantaged" people. The ISTEA allows a small business entity to qualify as "socially and economically disadvantaged" in either of two ways: first, by relying on the race- or gender-based presumption of such disadvantage, *see* ISTEA § 1003(b)(2)(B); or, second, by satisfying the race- and gender-neutral criteria established in the statute and amplified in the regulations, *see* 15 U.S.C. §§ 637(a)(5), 637(a)(6)(A); 13 C.F.R. §§ 124.105(c), 124.106; 49 C.F.R. pt. 23, subpt. D, app. C. Consequently, there is no truth to CVE's claim that socially disadvantaged individuals – and, by extension, economically disadvantaged individuals – are necessarily minorities. *See* Appellant's Reply Br. at 16.

Based on this statutory framework, it is clear that the legislative intent to foster development in small businesses whose owners have had to overcome social and economic hardship would remain even in the absence of the challenged presumption. To conclude otherwise would erroneously ignore the statutory race- and gender-neutral methods of establishing social and economic disadvantage. *See American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 990 (10th Cir.1991) ("Courts should attempt to give some reasonable meaning to all of the words included in a legislative enactment."); *Bridger Coal Co./Pac. Minerals, Inc. v. Director, OWCP, United States Dep't of Labor*, 927 F.2d 1150, 1153 (10th Cir.1991) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.").

The legislative history to the SBA and the ISTEA further indicates that the presumption is severable from the rest of the DBE program. The House Conference Report accompanying the passage of the ISTEA discusses the potential benefits of the DBE program, including "additional tax revenues paid to the state by DBE firms; unemployment tax reduction; racial and gender diversity in the highway construction field; economic developing in disadvantaged communities as a result of increased capital to DBEs; and an increase in the number of skilled subcontractors in the highway construction field, thus providing for greater competition among such contractors in the future." *See* H.R. Conf. Rep. No. 102-404, at 306 (1991), reprinted in 1991 U.S.C.C.A.N. 1679, 1686. Although the allegedly impermissible goal of racial and gender diversity is included in this list, all of the other

stated benefits are completely unrelated to racial or gender preference. In addition, the legislative history of amendments to the SBA effectively indicates that the primary goal of the ISTEA's DBE program is to aid socially and economically disadvantaged businesses. The added presumption serves only as recognition that "in many . . . cases status as a minority can be directly and unequivocally correlated with social disadvantagement and this condition exists regardless of the individual, personal qualities of that minority person." *See* H.R. Conf. Rep. No. 95-1714, at 21 (1978), reprinted in 1978 U.S.C.C.A.N. 3879, 3882; *see also id.* at 22 ("[T]he Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias. For example, a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged, provided that the conditions leading to such disadvantagement are beyond the ability of the person to control."), reprinted in 1978 U.S.C.C.A.N. 3879, 3882. The legislative history, therefore, confirms that Congress would have enacted this legislation regardless of the allegedly impermissible goal of favoring minority- and women-owned businesses.

B. Meaningful Reduction in Number of DBEs

The DBE program would continue even absent the disputed presumption, so that small businesses whose owners could prove they were disadvantaged – and thereby qualify as DBEs – would continue to have an advantage over businesses like CVE that are too large to qualify as DBEs. However, we recognize that CVE might

nonetheless establish standing by demonstrating that a favorable judicial determination would "likely" improve the terms of competition it faces. *See Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. 2130. To do this, however, CVE would have to show at a bare minimum that the practical effect of eliminating the presumption would be some meaningful reduction in the number of DBEs against which it would be forced to compete. The reduction would have to be meaningful else a claimed reduction in the number of contracts awarded to DBEs would be no more than speculation and accordingly insufficient to establish standing. Because, at summary judgment, it is a plaintiff's burden to adduce evidence sufficient to establish necessary jurisdictional facts, *see id.*, CVE may not establish standing by merely hypothesizing that elimination of the presumption would improve its terms of competition. Yet that is all it has done in this case. In fact, the record before us includes no evidence that any DBEs would be disqualified as a result of eliminating the presumption.

In its complaint, CVE points to two separate contracts it lost to High Desert Contractors, Inc. ("High Desert") solely because High Desert is a DBE. *See* Appellant's App. at 4. According to UDOT, "High Desert is certified as a DBE because of its president's . . . Hispanic national origin and because [the president] demonstrated to the satisfaction of the SBA that she was socially and economically disadvantaged." Appellant's App. at 287 (declaration of Charles K. Larson, Civil Rights Manager for UDOT) (emphasis added). But CVE has adduced no evidence that the SBA's determination of social and economic disadvantage was based on consideration of the

allegedly impermissible presumption. Indeed, the president of High Desert indicated that the SBA's certification "was on the basis of my national origin . . . and because I demonstrated to the satisfaction of the SBA that I was socially and economically disadvantaged," *see id.* at 311 (declaration of Victoria Gilbert, president of High Desert) (emphasis added), and CVE has offered nothing to refute her claim. Accordingly, any suggestion that High Desert would not continue to qualify as a DBE even if deprived of the disputed presumption is pure speculation.

With respect to other subcontractors, the record does contain a list of businesses that UDOT has certified as DBEs. The record, however, is silent on whether those subcontractors relied on the disputed presumption, the race- and gender-neutral criteria, or both to receive such certification. In fact, there is no evidence that any other subcontractors against whom CVE competes would lose their DBE status as a result of eliminating the presumption. CVE has therefore made no showing that an improvement in its terms of competition for subsequent contracts would likely result from a substantive adjudication in its favor. Standing is denied.

AFFIRMED.

Judge McWilliams, dissents.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CACHE VALLEY ELECTRIC CO., a Utah Corporation, Plaintiff, -vs- STATE OF UTAH DEPARTMENT OF TRANSPORTATION and CHARLES K. "CHUCK" LARSON, its civil rights manager, Defendants.	**JUDGMENT** Case No. 2:96cv0062 Judge David K. Winder
UNITED STATES DEPARTMENT OF TRANSPORTATION, Defendant/Intervenor.	

In accordance with the Memorandum Decision and Order entered this date, denying plaintiff's motion for summary judgment and granting defendants' and defendant/Intervenor's motions for summary judgment, and based thereon and good cause appearing, and pursuant to F.R.Civ.P. 58,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's complaint is dismissed for lack of jurisdiction.

Dated this 7th day of March, 1997.

BY THE COURT:

/s/ David K. Winder
David K. Winder
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CACHE VALLEY ELECTRIC CO., a Utah Corporation, Plaintiff, -vs- STATE OF UTAH DEPARTMENT OF TRANSPORTATION and CHARLES K. "CHUCK" LARSON, its civil rights manager, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING** Case No. 2:96cv0062 Judge David K. Winder
UNITED STATES DEPARTMENT OF TRANSPORTATION, Defendant/Intervenor.	

This matter is before the court on Plaintiff's and Defendants' Cross-Motions for Summary Judgment. Plaintiff, an electrical contractor, filed this action on January 22, 1996, challenging the constitutionality of an affirmative action program which awards a set-aside percentage of government contracts on the basis of race and gender. Plaintiff contends that certain provisions of

the Small Business Act, 15 U.S.C. § 637, and related regulations violate Plaintiff's right to equal protection of the law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks declaratory and injunctive relief to restrain Defendants from using any race-based or gender-based presumptions in the government's administration of the program.

Defendants contest Plaintiff's standing to raise this claim and argue that the challenged program and implementing laws and regulations withstand strict judicial scrutiny pursuant to an equal protection analysis.

This court was recently advised that a number of government contracts are scheduled to be let in the local area within the next few weeks which might be significantly affected by a decision in this case; therefore, at the parties' request, an expedited hearing was held on March 5, 1997. At the hearing, Plaintiff was represented by George A. Hunt and Carolyn Stevens Jensen. Defendants were represented by Leland D. Ford and Charles E. Leggott. The state defendants, Charles K. Larson and the Utah Department of Transportation, have adopted and relied upon the memoranda, supporting papers, and arguments of the defendant/intervenor United States Department of Transportation.

Before the hearing, the court had carefully considered the lengthy memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

Plaintiff frequently submits bids for contract work relating to federally funded transportation projects. In November of 1995, Plaintiff submitted the low bid for electrical work on an undertaking known as the Creek Road Project. The price of the bid, approximately $180,000, was significantly lower than the next lowest bid of approximately $203,000 submitted by High Desert Contractors, Inc., a business which is majority-owned and controlled by a woman who is also hispanic. In preparing its bid to the Utah Department of Transportation (UDOT), the prime contractor, J.D. McNiel Construction, Inc., used High Desert's higher quote for electrical work because High Desert qualified as a disadvantaged business enterprise (DBE) and Plaintiff did not. In December of 1995, Plaintiff submitted the low bid for electrical work on an undertaking known as the Redwood Road Project. As with the previous contract, the prime contractor, Geneval Rock Construction, Inc., used the significantly higher bid of High Desert. In each of these cases, the prime contractors assert that, but for UDOT's DBE program the electrical subcontract would have been awarded to Plaintiff.

A. The Government Program

The SBA Section 8(a) program was enacted to promote "the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy." 15 U.S.C. § 631(f)(2) (explaining purpose of section 637(a)). To that end, Congress provided that "10 percent of the

amounts authorized to be appropriated [from among several other sources, the Highway Trust Fund,] shall be expended with small business concerns owned and operated by socially and economically disadvantaged individuals." 23 U.S.C. § 101 (historical and statutory notes citing Federal-Aid Highway Act of 1987, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145). Only businesses that meet the requirements for qualification as a DBE are eligible to compete for these funds.

In order to qualify as a DBE, a business must be: (1) a small business concern, and (2) owned and operated by socially and economically disadvantaged individuals. 13 C.F.R. § 124.102, .105, .106. As applicable to this case, a small business concern is a business which has an average of annual gross receipts less than $16.6 million. 49 C.F.R. § 23.62 (1996); 59 Fed. Reg. 67,367 (1994). Socially and economically disadvantaged individuals are defined as women and members of various minority groups including Hispanic Americans. 49 C.F.R. § 23.62.[1]

Accordingly, in order to receive federal funds for various transportation projects, the State of Utah, through the Utah Department of Transportation, is required to comply with an established federal quota which ensures

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[1] Defendants contend that women are not presumed to be socially and economically disadvantaged under the Section 8(a) program. Whether or not that is an accurate statement of the existing law, the court notes that UDOT makes such a presumption in its implementation of the program. *See* Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit G, at ¶ (A)(2) (appendix setting forth UDOT bid conditions and including women in definition of persons who are socially and economically disadvantaged).

the participation of DBEs in highway projects subsidized by federal funds. Alternatively, UDOT may attempt to demonstrate a good faith effort to comply by submitting detailed explanations and justification which are subject to approval or disapproval by the federal administrator. Failure to satisfy the administrator in this regard is considered noncompliance and may result in the suspension or termination of federal funds or refusal to approve other projects, grants, or contracts until compliance is achieved. 49 C.F.R. § 23.68(e) (1996).

In order to meet the conditions attached to this federal assistance, for each UDOT project financed in whole or in part with UDOT funds, UDOT sets a goal for the percentage of work to be performed by qualified DBE firms. A prime contractor's bid is deemed responsive only if the prime contractor either: (1) satisfies the DBE percentage goal advertised by UDOT for that particular project, or (2) certifies in writing that a good faith effort has been made to achieve the goal and that such an effort will continue to be made during performance of the contract. *See* Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit G, at ¶ (B)(5) (explaining UDOT determination of responsive bidder).

Plaintiff has had an average of annual gross receipts over the last three years of approximately $41 million. Plaintiff is not owned or controlled by a woman or a person representing one of the groups listed at 13 C.F.R. § 124.105(b) (1996) who the law presumes to be socially disadvantaged.

III. STANDING

As a threshold consideration to reaching the merits of Plaintiff's claims, this court must determine the issue of standing. To meet this jurisdictional prerequisite, Plaintiff "must establish: (1) injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) likelihood that the injury will be redressed by a favorable decision." *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir. 1996).

In *Wilson*, the Tenth Circuit explained that persons claiming discrimination in the denial of a government benefit may establish standing by showing that the discrimination deprived them of the ability to compete for the benefit on an equal footing. *Id.* at 593. However, if the person fails to satisfy an otherwise lawful, non-discriminatory requirement for the benefit, the person fails to establish standing because a favorable decision on the discrimination claim could not redress the injury which continues to inhibit the person's ability to compete.[2]

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[2] In *Wilson v. Glenwood Intermountain Prop., Inc.*, 98 F.3d 590 (10th Cir. 1996), the court addressed the gender discrimination claims of the plaintiffs who sought housing in gender-segregated apartments certified as off-campus housing for students attending Brigham Young University. *Id.* at 592. The court held that the plaintiffs, who were not students, lacked standing to litigate their discrimination claims because the law allowed landlords to prefer students over non-students. *Id.* at 594. The court explained: "As non-students, plaintiffs lack standing to bring their gender discrimination claims because even in the absence of the challenged gender discrimination they would not have qualified to rent the student apartments." *Id.*

Plaintiff's injury is its inability to compete for government subsidized contracts on an equal footing with businesses classified as DBEs pursuant to the Section 8(a) program. *See Adarand Constr. Inc. v. Pena*, 115 S. Ct. 2097, 2105 (1995). However, this court cannot say that the challenged race and gender presumptions are causally connected to that injury. Moreover, rendering those presumptions unconstitutional would not redress Plaintiff's maltreatment.

Only certified disadvantaged business enterprises are allowed to participate in the Section 8(a) program. To attain that certification, a business must satisfy a two-pronged requirement: (1) the business must be a small business concern, and (2) the business must be owned and operated by individuals who are socially and economically disadvantaged. 13 C.F.R. § 124.102, .105, .106.

Plaintiff argues vigorously that its injury is attributable to the DBE program, not to the fact that Plaintiff is too large to participate. Plaintiff further contends that if parties such as it lack standing to challenge the program because they do not qualify to participate, then only program participants would have standing to challenge the program.

While this court may agree with Plaintiff, that its injury is attributable to the program, that injury is fairly traceable only to that aspect of the program that limits participation based on Plaintiff's financial status. Plaintiff's effort to link its inability to compete on an equal footing with the racial and gender presumptions Plaintiff challenges is only speculative because, even if this court were to hold the second prong of the DBE certification

criteria unconstitutional, Plaintiff would still be prevented from competing for contracts on an equal footing due to the remaining race-neutral and gender-neutral classification based on Plaintiff's financial status. *See Oglesby Const., Inc. v. Skinner,* No. 88-4012, 1990 WL 81694, at *4-5 (6th Cir. June 15, 1990) (holding $14 million ceiling on 8(a) program barred minority-owned business from continued participation in 8(a) program). A business need not be a program participant to establish standing, as Plaintiff suggests. The business need only show that it is otherwise qualified to participate in the program and is prevented from doing so by the challenged discriminatory policies.

At the hearing, Plaintiff's counsel argued persuasively that, notwithstanding the program's size restrictions, eliminating the race-based and gender-based presumptions would result in fair and open competition among subcontractors, the remedy Plaintiff seeks. With the eradication of these presumptions, every applicant for DBE status would be required to show actual social disadvantage. *See* 13 C.F.R. § 124.105 (1996) (explaining current law setting forth burden and criteria that must be shown by individuals who are not members of designated groups to prove social disadvantage). As a result, fewer businesses will qualify for the program. Without a sufficient number of qualified DBEs to fill the project quotas, the prime contractors, and in turn the state, will be forced to obtain waivers to the federal quota. As a consequence, the subcontractors who can no longer qualify as DBEs, would be required to compete for contracts.

While Plaintiff's argument may have merit, it is not sufficient to confer standing because it rests on too many

assumptions. First, the argument supposes that there are companies presently qualified as DBEs because they are presumed to be socially disadvantaged when, in fact, these companies are not socially disadvantaged. At this point in time, that is mere speculation. For example, Plaintiff has not argued that its competitor, High Desert, is not actually socially disadvantaged.[3] Second, Plaintiff assumes that eliminating the presumptions will result in fewer DBEs. However, there is no guarantee that bona-fide DBEs will not surface to fill the void left by those denied that status without the presumption. Third, Plaintiff seems to suggest that fewer DBEs will result in more contract awards for Plaintiff. However, some subcontracts may exist solely due to the prime contractor's efforts to fill that DBE quota. Without the quota, there may be no subcontract for which to compete. In other words, with no DBEs and no quotas, the prime contractor may decide not to subcontract at all, electing to do that part of the work on its own.

While these assumptions may indeed be fact, at this point, they are too speculative to support the direct causal link necessary to support Plaintiff's standing. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury *as the result of* [a statute's] enforcement." *Linda R.S. v. Richard D.*, 410 U.S. 614, 618

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[3] It should be noted that the regulations allow a third party to challenge the presumption that an individual is socially disadvantaged. *See* 49 C.F.R. § 23.69 (1996) (explaining procedure for challenging socially and economically disadvantaged status).

(1973) (holding mother lacked standing to compel criminal prosecution of her child's father for failure to pay child support because such enforcement would have resulted only in jailing of father, not the payment of child support which was the remedy the mother sought) (emphasis and alterations in original) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Plaintiff has not made this showing.

Several other courts have addressed the issue of standing under similar or analogous challenges to the Section 8(a) program. *See C.S. McCrossan Constr. Co. v. Cook*, No. 95-1345-HB, 1996 WL 310298, at *2-3 (D. N.M. Apr. 2, 1996) (finding standing established by large company challenging 8(a) program); *Ellsworth Assoc., Inc. v. United States*, 926 F. Supp. 207, 210 (D. D.C. 1996) (denying standing to challenge constitutionality of racial presumptions where plaintiff's injury was traceable solely to the racially neutral nine-year statutory limitation on participation in 8(a) program); *Dynalantic Corp. v. Department of Defense*, 937 F. Supp. 1, 6 (D. D.C. 1996) (holding plaintiff lacked standing to challenge constitutionality of section 8(a) because it did not allege either social or economic disadvantage even though it qualified as small business); *Cortez III Serv. Corp. v. NASA*, No. 96-01301, 1996 WL 756549, at *2-3 (D. D.C. Nov. 27, 1996) (finding standing for large nonminority business because government had discretion in deciding whether or not to offer new contract under 8(a) program and plaintiff alleged that government used racial considerations in exercising that discretion).

In view of these inconsistent results, and the foregoing observations, this court feels persuaded and, indeed,

compelled to follow the rationale set forth by the Tenth Circuit in *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir. 1996). This court is precluded from reaching the merits of Plaintiff's equal protection claim because, even if the court held the government's racial and gender biases unconstitutional, Plaintiff would still be prevented from competing on an equal footing do to its size. Plaintiff's injury would not be redressed by a favorable decision by this court, therefore, Plaintiff lacks standing.[4]

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[4] On March 5, 1997, the day of the hearing on this matter, the court received a letter from Plaintiff's counsel supplementing Plaintiff's arguments with regard to the issue of standing. As counsel recognizes, it is irregular and somewhat improper for the court to consider additional arguments raised after the hearing. Notwithstanding that observation, the court feels that Plaintiff's points have been adequately addressed in this Memorandum Decision.

The court relies on the *Adarand* case only to the extent that it supports recognition of Plaintiff's alleged injury for purposes of standing. Furthermore, in its effort to distinguish the facts of this case from *Wilson v. Glenwood Intermountain Prop., Inc.*, 98 F.3d 590 (10th Cir. 1996), Plaintiff urges this court to reach too far in view of the unambiguous language already cited representing the Tenth Circuit's law on standing. Finally, Plaintiff is wrong in its assertion that the court adds a fourth requirement for the standing test; that is, that Plaintiff be eligible to participate in the program in order to establish standing. At the risk of rendering an advisory opinion, it seems to this court that, if Plaintiff were not eligible to participate in the program due only to the race or gender of its owner, this court would have no trouble in finding that Plaintiff had standing. In that event, Plaintiff's inability to participate would be directly linked to the challenged discriminatory practices of which Plaintiff now complains. It is Plaintiff's inability to establish such a connection between its injury and the

CONCLUSION

Accordingly, based on the foregoing and good cause appearing, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Summary Judgment is DENIED.

2. Defendants' Cross-Motion for Summary Judgment is GRANTED.

DATED this 7th day of March, 1997.

BY THE COURT:

/s/ David K. Winder
David K. Winder
Chief Judge

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government's conduct which prevents this court from reaching the merits of Plaintiff's case.

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SURFACE TRANSPORTATION AND UNIFORM RELOCATION ASSISTANCE ACT OF 1987 (STURAA), PUB. L. NO. 100.17, 101 STAT. 132

§ 106

(c) Disadvantaged Business Enterprises.

(1) *General rule.* – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) *Definitions.* – For purposes of this subsection –

(A) *Small Business Concern.* – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $14,000,000 as adjusted by the Secretary for inflation.

(B) *Socially and economically disadvantaged individuals.* – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed

to be socially and economically disadvantaged individuals for purposes of this subsection.

INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991 (ISTEA), PUB. L. 102-240, 105 STAT. 1919-1921

§ 1003(b)

(1) *General rule.* – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I (other than part B), III, V, and VI of this Act [Pub. L. 102-240, Dec. 18, 1991, 105 Stat. 1914] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions. – For purposes of this subsection, the following definitions apply:

(A) *Small business concern.* – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $15,370,000, as adjusted by the Secretary for inflation.

(B) *Socially and economically disadvantaged individuals.* – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

(3) *Annual listing of disadvantaged business enterprises.* – Each State shall annually survey and compile a list of the small business concerns referred to in paragraph (1) and the location of such concerns in the State and notify the Secretary, in writing, of the percentage of such concerns which are controlled by women, by socially and economically disadvantaged individuals (other than women), and by individuals who are women and are also otherwise socially and economically disadvantaged individuals.

(4) *Uniform certification.* – The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment. analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

(5) *Study.* –

(A) In general. – The Comptroller General shall conduct a study of the disadvantaged business enterprise program of the Federal Highway Administration (hereinafter in this paragraph referred to as the "program").

(B) Contents. – The study under this paragraph shall include the following:

(i) Graduation. – A determination of –

(I) the percentage of disadvantaged business enterprises which have enrolled in the program and graduated after a period of 3 years;

(II) the number of disadvantaged business enterprises which have enrolled in the program and not graduated after a period of 3 years;

(III) whether or not the graduation date of any of the disadvantaged business enterprises described in subclause (II) should have been accelerated;

(IV) since the program has no graduation time requirements, how many years would appear reasonable for disadvantaged business enterprises to participate in the program;

(V) the length of time the average small nondisadvantaged business enterprise takes to be successful in the highway construction field as compared to the average disadvantaged business enterprise; and

(VI) to what degree are disadvantaged business enterprises awarded contracts once they are no longer participating in the disadvantaged business program.

(ii) Out-of-State contracting. – A determination of which State transportation programs meet the requirement of the program for 10 percent participation by disadvantaged business enterprises by contracting with contractors located in another State and a determination

to what degree prime contractors use out-of-State disadvantaged business enterprises even when disadvantaged business enterprises exist within the State to meet the 10 percent participation goal and reasons why this occurs.

(iii) Program adjustments. – A determination of whether or not adjustments in the program could be made with respect to Federal and State participation in training programs and with respect to meeting capital needs and bonding requirements.

(iv) Success rate. – Recommendations concerning whether or not adjustments described in clause (iii) would continue to encourage minority participation in the program and improve the success rate of the disadvantaged business enterprises.

(v) Performance and financial capabilities. – Recommendations for additions and revisions to criteria used to determine the performance and financial capabilities of disadvantaged business enterprises enrolled in the program.

(vi) Enforcement mechanisms. – A determination of whether the current enforcement mechanisms are sufficient to ensure compliance with the disadvantaged business enterprise participation requirements.

(vii) Additional costs. – A determination of additional costs incurred by the Federal Highway Administration in meeting the requirement of the program for 10 percent participation by disadvantaged business enterprises as well as a determination of benefits of the program.

(viii) Effect on industry. – A determination of how the program is being implemented by the construction industry and the effects of the program on all segments of the industry.

(ix) Certification. – An analysis of the certification process for Federal-aid highway and transit programs, including a determination as to whether the process should be uniform and permit State-to-State reciprocity and how certification criteria and procedures are being implemented by the States.

(x) Goals. – A determination of how the Federal goal is being implemented by the States, including the waiver process, and the impact of the goal on those individuals presumed to be socially and economically disadvantaged.

(C) Report. – Not later than 12 months after the date of the enactment of this Act [Dec. 18, 1991], the Comptroller General shall transmit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a report on the results of the study conducted under this paragraph.

TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY (TEA-21), PUB. L. NO. 105-178

§ 1101

(b) Disadvantaged Business Enterprises. –

(1) *General rule.* – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I,

III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) *Definitions.* – In this subsection, the following definitions apply:

(A) *Small business concern.* – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $16,600,000, as adjusted by the Secretary for inflation.

(B) *Socially and economically disadvantaged individuals.* – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

(3) *Annual listing of disadvantaged business enterprises.* – Each State shall annually survey and compile a list of the small business concerns referred to in paragraph (1) and the location of such concerns in the State and notify the Secretary, in writing, of the percentage of such concerns which are controlled by women, by socially and economically disadvantaged individuals (other than women), and by individuals who are women

and are otherwise socially and economically disadvantaged individuals.

(4) *Uniform certification.* – The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

(5) *Compliance with court orders.* – Nothing in this subsection limits the eligibility of an entity or person to receive funds made available under titles I, III, and V of this Act, if the entity or person is prevented, in whole or in part, from complying with paragraph (1) because a Federal court issues a final order in which the court finds that the requirement of paragraph (1), or the program established under paragraph (1), is unconstitutional.

(6) *Review by comptroller general.* – Not later than 3 years after the date of enactment of this Act, the Comptroller General of the United States shall conduct a review of, and publish and report to Congress findings and conclusions on, the impact throughout the United States of administering the requirement of paragraph (1), including an analysis of –

(A) in the case of small business concerns certified in each State under paragraph (4) as owned and controlled by socially and economically disadvantaged individuals –

(i) the number of the small business concerns; and

(ii) the participation rates of the small business concerns

in prime contracts and subcontracts funded under titles I, III, and V of this Act;

(B) in the case of small business concerns described in subparagraph (A) that receive prime contracts and subcontracts funded under titles I, III, and V of this Act –

(i) the number of the small business concerns;

(ii) the annual gross receipts of the small business concerns; and

(iii) the net worth of socially and economically disadvantaged individuals that own and control the small business concerns;

(C) in the case of small business concerns described in subparagraph (A) that do not receive prime contracts and subcontracts funded under titles I, III, and V of this Act –

(i) the annual gross receipts of the small business concerns; and

(ii) the net worth of socially and economically disadvantaged individuals that own and control the small business concerns;

(D) in the case of business concerns that receive prime contracts and subcontracts funded under titles I,

III, and V of this Act, other than small business concerns described in subparagraph (B) –

(i) the annual gross receipts of the business concerns; and

(ii) the net worth of individuals that own and control the business concerns;

(E) the rate of graduation from any programs carried out to comply with the requirement of paragraph (1) for small business concerns owned and controlled by socially and economically disadvantaged individuals;

(F) the overall cost of administering the requirement of paragraph (1), including administrative costs, certification costs, additional construction costs, and litigation costs;

(G) any discrimination on the basis of race, color, national origin, or sex against small business concerns owned and controlled by socially and economically disadvantaged individuals;

(H) (i) any other factors limiting the ability of small business concerns owned and controlled by socially and economically disadvantaged individuals to compete for prime contracts and subcontracts funded under titles I, III, and V of this Act; and

(ii) the extent to which any of those factors are caused, in whole or in part, by discrimination based on race, color, national origin, or sex;

(I) any discrimination, on the basis of race, color, national origin, or sex, against construction companies owned and controlled by socially and economically disadvantaged individuals in public and private transportation contracting and the financial, credit, insurance, and bond markets;

(J) the impact on small business concerns owned and controlled by socially and economically disadvantaged individuals of –

(i) the issuance of a final order described in paragraph

(5) by a Federal court that suspends a program established under paragraph (1); or

(i) the repeal or suspension of State or local disadvantaged business enterprise programs; and

(K) the impact of the requirement of paragraph (1), and any program carried out to comply with paragraph (1), on competition and the creation of jobs, including the creation of jobs for socially and economically disadvantaged individuals.

SMALL BUSINESS ACT §8(a) – 15 U.S.C. § 637(a)(4)(5) & (6)(A)

(4)(A) For purposes of this section, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) and –

(i) which is at least 51 per centum unconditionally owned by –

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization, or

(ii) in the case of any publicly owned business at least 51 per centum, of the stock of which is unconditionally owned by –

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization.

(4)(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more –

(i) socially and economically disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I),

(ii) members of an economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II), or

(iii) Native Hawaiian organizations described in subparagraph (A)(i)(III) or subparagraph (A)(ii)(III).

(4)(C) Each Program Participant shall certify, on an annual basis, that it meets the requirements of this paragraph regarding ownership and control.

(5) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(6)(A) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets.

SMALL BUSINESS ACT §8(d) – 15 U.S.C. § 637(d)(2)(3), (5) & (6)

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which –

(2)(A) does not exceed the simplified acquisition threshold;

(2)(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto RICO; or

(2)(C) is for services which are personal in nature.

(3) The clause required by paragraph (2) shall be as follows:

(3)(A) "It is the policy of the United States that small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

(3)(B) "The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in

any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

(3)(C) "As used in this contract, the term 'small business concern' shall mean a small business as defined pursuant to section 3 of the Small Business Act [15 U.S.C.A. 632] and relevant regulations promulgated pursuant thereto. The term 'small business concern owned and controlled by socially and economically disadvantaged individuals' shall mean a small business concern –

(i) "which is at least 51 per ceritum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(ii) "whose management and daily business operations are controlled by one or more of such individuals.

"The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C.A. 637(a)].

(3)(D) "The term 'small business concern owned and controlled by women' shall mean a small business concern –

(i) "which is at least 51 per centum owned by one or more women; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more women; and

(ii) "whose management and daily business operations are controlled by one or more women.

(3)(E) "Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals, or a small business concern owned and controlled by women.

(3)(F) "In this contract, the term 'qualified HUBZone small business concern' has the meaning given that term in section 632(p) of this Title."

* * *

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which –

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities,

shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(5)(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract, Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include –

(6)(A) percentage goals for the utilization as subcontractors of small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women;

(6)(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(6)(C) a description of the efforts the offeror or bidder will take to assure that small business concerns, qualified

HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women will have an equitable opportunity to compete for subcontracts;

(6)(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(6)(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(6)(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; and

efforts to identify and award subcontracts to such small business concerns.

SMALL BUSINESS ACT – 15 U.S.C. § 644(g)(1)

(g) Goals for participation of small business concerns in procurement contracts

(1) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by qualified HUBZone small business concerns shall be established at not less than 1 percent of the total value of all prime contract awards for fiscal year 1999, not less than 1.5 percent of the total value of all prime contract awards for fiscal year 2000, not less than 2 percent of the total value of all prime contract awards for fiscal year 2001, not less than 2.5 percent of the total value of all prime contract awards for fiscal year 2002, and not less than 3 percent of the total value of all prime contract awards for fiscal year 2003 and each fiscal year thereafter. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for

each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

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49 C.F.R. § 23.62;

Definitions: *Socially and economically disadvantaged individuals* means those individuals who are citizens of the United States (or legally admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business

Administration pursuant to section 8(a) of the Small Business Act. Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may determine, on a case by case basis that individuals who are not a member of one of the following groups are socially and economically disadvantaged:

Black Americans, which includes persons having origins in any of the Black racial groups of Africa;

Hispanic Americans which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

Native Americans, which includes persons who, are American Indians, Eskimos, Aleuts, or Native Hawaiians;

Asian-Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

Asian-Indian Americans, which includes persons whose origins are from India, Pakistan, and Bangladesh.

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13 C.F.R. § 124.105(c)(1)

Individuals, not members of designated groups.: An individual who is not a member of one of the above named

groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence.

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49 C.F.R. Part 23, Subpart D, Appendix C:

Elements of Social Disadvantage. In order to determine that an individual is socially disadvantaged, the recipient must conclude that the individual meets the following standards: (i) The individual's social disadvantage must stem from his or her color, national origin, gender, physical handicap; long term residence in an environment isolated for the mainstream of American society; or other similar causes beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors, which are common to small business persons who are not socially disadvantaged. For example, because of their marginal financial status, many small businesses have difficulty obtaining credit through normal banking channels an individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes – not simply on the individual's or the firm's marginal financial status. (ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a nondesignated group. which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or

her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be. In assessing such facts, the recipient should place substantial weight on prior administrative or judicial findings of discrimination experienced by the individual such findings, however, are not necessarily conclusive evidence of an individual's social disadvantage; nor are they a prerequisite for establishing social disadvantage. (iii) The individual's social disadvantage must be rooted in treatment, which he or she has experienced in American society, not in other countries. (iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant. Typically a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. (v) The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world.

The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. For example, the recipient should place little weight on annoying incidents experienced by the individual which have had little or no impact on the person's career or business development. On the other hand, the recipient should place greater weight on concrete occurrences which have tangibly disadvantaged an individual in the business world.

[LOGO]

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

March 5, 1998

The Honorable Pete V. Domenici
United States Senate
Washington, DC 20510

Dear Senator Domenici:

This letter responds to questions that you have posed regarding the Disadvantaged Business Enterprise (DBE) Program currently authorized by the Intermodal Surface Transportation and Efficiency Act.

1. Has the text of section 1111 been ruled on by the Supreme Court, and if not, how does section 1111 differ from the statute that was before the Supreme Court in *Adarand v. Pena*?

The Supreme Court in *Adarand v. Pena* did not find this or any other program to be unconstitutional. Indeed, the Supreme Court did not even consider the constitutionality of section 1003(b) of ISTEA, which sets a 10% goal for expenditure of the authorized funds with DBEs. The *Adarand* case involved a different program: the Department of Transportation's use in its own direct federal contracts of compensation to encourage federal prime contractors to use DBE subcontractors. The compensation was provided through a specific contract provision used only in DOT's own direct contracts for highways on federal lands. Even as to this compensation program, the Supreme Court's opinion merely establishes that federal race-conscious programs, like state and local programs, are subject to strict scrutiny. The Court made

clear, however, that such scrutiny is not "fatal in fact," and that the federal government has a compelling interest in remedying the lingering effects of discrimination through properly tailored programs.

2. How do you conclude that Section 1111 of the ISTEA bill was not before the Supreme Court in *Adarand v. Pena* and has not been declared unconstitutional?

The Supreme Court's opinion in *Adarand* addresses only the DOT's subcontracting compensation program, not the ISTEA DBE program. The Supreme Court's remand in *Adarand* makes this clear – it states that the courts below were to determine only "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." 515 U.S. at 2. Only one district court judge – the judge who is considering the remand in *Adarand* – has found the compensation clause program unconstitutional. While that district court judge also ruled the ISTEA program unconstitutional, the constitutionality of ISTEA was not properly before the court. The Justice Department has argued on appeal to the Tenth Circuit that the district court improperly addressed the constitutionality of ISTEA and, in any event, erroneosly [sic] concluded that ISTEA was unconstitutional.

3. Section 1111 of the ISTEA bill states, "not less than 10 percent of the amounts made available under the program shall be expended with small business concerns controlled by socially and economically disadvantaged individuals." In view of this language, why is the DBE program not a mandatory set aside or rigid quota program?

The 10 percent figure contained in the statute is not a mandatory set aside or rigid quota. First, the statute explicitly provides that the Secretary of Transportation may waive this goal for any reason – specifically, the language quoted above is preceded by the phrase "[e]xcept to the extent that the Secretary determines otherwise." Second, in no way is the 10-percent figure imposed on any state or locality. Under the program, it is the states that really set goals for contracting. They may set goals higher or lower than 10 percent depending upon the local availability of DBEs, projected contracting needs and past results of their efforts. Moreover, state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible.

The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the program require recipients to use set asides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department's current or proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed number of dollars or contracts for DBEs.

4. The comments to the new rule states, "[i]f race-neutral means are the first resort under this proposed section, then set asides and other more intrusive means, such as a conclusive presumption, are the last resort." In view of this language, why is this not a mandatory set aside or rigid quota program?

The comment is intended to make clear that race- and gender-neutral mechanisms (e.g., outreach, technical assistance) are the means of first resort for recipients to use in seeking to meet overall goals. In fact, the rule itself prohibits setting aside particular contracts unless the state has been unable to meet its goals for a number of years *and* there is a court-order or state law which directs the recipient to use set asides. Such set asides would not be permitted, even where state law authorizes their use, unless it can be shown that less restrictive measures, including race neutral programs and flexible contract goals, were insufficient to address the demonstrated effects of discrimination. As discussed above, the DBE program thus neither mandates set asides nor permits the use of rigid quotas.

5. Are there sanctions, penalties or fines that may be imposed on any recipient who does not meet DBE program goals? In the fifteen years that this program has been in operation, has any state been sanctioned for not meeting its program goals? In answering please provide specific examples to support your conclusion.

No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the statute or the regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals. In 1995, two states failed to meet their goals; in 1996, two other states failed to meet their goals; and, in 1997, three states failed to meet their goals. There were no sanctions, penalties or fines of any kind imposed against any of those states.

6. Is this program only for minorities and women?

No. Any individual owning a business may demonstrate that he is socially and economically disadvantaged, even if that individual is not a woman or minority. Both the current and proposed regulations provide detailed guidance to recipients to assist them in making individualized determinations of disadvantaged status. And, in fact, businesses owned by white males have qualified for DBE status.

7. What recourse is available to low bidders who have made good faith efforts to meet DBE contract goals, but despite those efforts were not able to do so? Is it true that low bidders who have tried but failed to meet the contract's DBE goal are automatically eliminated from consideration for the contract?

Under the current regulations, if a prime contractor is unable to find available and qualified DBEs to meet a specific contract goal, the goal may be waived. Under the proposed rule, the goal must be waived. No low bidder who tried in good faith but filed to meet the goal is automatically eliminated from receiving the contract.

Than you for your interest in, and support of, this important program.

Sincerely,

/s/ Janet Reno
Janet Reno

/s/ Rodney E. Slater
Rodney E. Slater

MYTHS AND FACTS:
DOT's Disadvantaged Business Enterprise Program

MYTH: There is no longer a need for a DBE program.

FACT: Yes there is. Minority and women-owned businesses are still under-represented in the construction industry. Discrimination in both contracting and in access to capital in the financial markets continues to limit the ability of minority and women-owned firms to reach their full potential.

- Minorities make up 20% of the population, yet minority-owned firms represent only 9% of all construction firms and receive only about 5% of all construction receipts.
- Women own one third of all firms, yet get only 19% of the business receipts.
- White-owned construction firms receive 50 times more loan dollars than black-owned firms with identical equity.

MYTH: The DBE program is a quota/set-aside program.

FACT: False. There are no quotas or set-asides of any kind imposed by DOT's DBE program. The 10% goal is a national target for DOT; state and local recipients of DOT funding set their own goals for DBE participation in construction projects based on the availability of disadvantaged businesses in their markets. There is never an absolute requirement that a goal be met and there are no adverse consequences if a state fails to meet its annual goal or a contractor fails to meet a goal after making food faith efforts.

MYTH: The Supreme Court said the DBE program is unconstitutional.

FACT: Not true. The Supreme Court did not rule on the program itself. Instead, in *Adarand*, the Court established a new standard of review called "strict scrutiny." Seven of the nine justices agreed that the federal government can still use affirmative action programs to combat the "lingering effects of racial discrimination."

MYTH: Affirmative action programs can't be constitutional under strict scrutiny.

FACT: Not True. Courts have upheld state and local race-based affirmative action programs, even under the strict scrutiny standard. The courts have recognized that discrimination still exists and affirmative action programs are often essential to remedy past discrimination and to break down continuing discriminatory barriers.

MYTH: The program must end because the District Court ruled it was not constitutional.

FACT: Not true. On remand, the *Adarand* district court accepted Congress' determination that there was a compelling need for the program, finding a "strong basis in evidence" to support Congress' choice to adopt a race-conscious program. The judge, however, decided that the program was not sufficiently narrow in its scope. In this part of his decision, the judge took a position which directly contradicts the Supreme Court and therefore should be viewed with skepticism. Moreover, the judge's decision did not consider ways DOT has proposed to modify the program. The new proposal properly tailors the program and will require "race-neutral" measures, such as outreach and technical assistance, before "race-conscious" measures are used. And, it will stress that good faith efforts are all that is needed to meet the goals. It also will

ensure that any goals that are set properly reflect the percentage of qualified disadvantaged businesses available in a given market.

Supreme Court, U.S.
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No. 98-579

In the Supreme Court of the United States

OCTOBER TERM, 1998

CACHE VALLEY ELECTRIC COMPANY, PETITIONER

v.

STATE OF UTAH DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

MARK L. GROSS
LISA J. STARR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

NANCY E. MCFADDEN
General Counsel
U.S. Department of Transportation
Washington, D.C. 20590

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner had failed to establish its standing to challenge the use of race- and gender-based presumptions in identifying disadvantaged business enterprises (DBEs), where petitioner (1) is unable to satisfy a race-neutral size limitation on DBEs and (2) did not present any evidence concerning the practical effects of a judicial order invalidating the challenged presumptions.

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OCTOBER TERM, 1998

No. 98-579

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 149 F.3d 1119. The opinion and judgment of the district court (Pet. App. 14-27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998. The petition for a writ of certiorari was filed on October 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1919, provided at all times relevant to

this litigation that "not less than 10 percent of the amounts authorized to be appropriated under [other provisions of the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." To qualify as a disadvantaged business enterprise (DBE), a firm must be (1) a "small business" and (2) owned and controlled by a "socially and economically disadvantaged" individual. ISTEA § 1003(b)(1) and (2), 105 Stat. 1919-1920. The DBE provisions of ISTEA are rooted in the longstanding "policy of the United States that small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. 637(d)(1) (Supp. II 1996).[1]

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[1] Section 1003(b) of ISTEA succeeded Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 145-146, and Section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, 96 Stat. 2100. Those provisions were modeled after Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. 6705(f)(2), which created a minority business enterprise (MBE) program at the Department of Commerce. This Court upheld the constitutionality of the MBE provision of the PWEA in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

Section 1003(b) of ISTEA has been superseded by new legislation. On June 9, 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107. TEA-21 contains DBE provisions that essentially replicate those formerly included in ISTEA. See TEA-21 § 1101(b)(1)-(5), 112 Stat. 113-114. Section 1101(b)(6) provides that within three years of the statute's enactment, "the Comptroller General of the United States shall conduct a review of, and publish

2. The Utah Department of Transportation (UDOT) received federal funds for highway construction contracts pursuant to ISTEA. As a recipient of federal funds, UDOT is required to maintain an approved DBE program. See 49 C.F.R. Pt. 23. Regulations promulgated by the United States Department of Transportation (DOT) require that recipients of federal funding establish an annual overall goal for DBE participation on federally-assisted projects, as well as individual contract goals for DBE participation on specific projects that have subcontracting possibilities. 49 C.F.R. 23.41, 23.45(g), 23.64; see also 49 C.F.R. Pt. 23, Subpt. D. In implementing the required DBE program, a recipient of federal funds must determine whether individual firms qualify as DBEs under criteria established by federal law. See 49 C.F.R. Pt. 23, Subpt. D, Apps. B-C.

3. Regulations promulgated by the DOT serve, *inter alia*, to establish the criteria under which DBEs are certified. See 59 Fed. Reg. 67,367 (1994). A "small business concern" is defined as a business with average annual gross receipts over the preceding three fiscal years not in excess of $16,600,000. 49 C.F.R. 23.62; 59 Fed. Reg. at 67,367-67,368; see ISTEA § 1003(b)(2)(A), 105 Stat. 1919. ISTEA § 1003(b)(2)(B) provides:

> The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically

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and report to Congress findings and conclusions on, the impact throughout the United States of administering the" DBE provisions. 112 Stat. 114.

> disadvantaged individuals for purposes of this subsection.

105 Stat. 1919-1920. Section 8(d) of the Small Business Act and the DOT regulations establish a rebuttable presumption that members of certain racial or ethnic groups are socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C); 49 C.F.R. Pt. 23, Subpt. D, App. C. Those groups are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and any other racial minority group or individual that the Small Business Administration has previously found to be disadvantaged pursuant to Section 8(a) of the Small Business Act. 49 C.F.R. 23.62; see also 13 C.F.R. 124.105(b).[2]

Under the applicable DOT regulations, the presumption that women and members of the specified racial and ethnic groups are socially and economically disadvantaged is rebuttable and is subject to challenge by third parties. 49 C.F.R. 23.69. Firms owned by persons presumed to be disadvantaged may be decertified or not certified at the outset if the recipient of federal funds determines that the individual owners are not in fact socially and economically disadvantaged. See 49 C.F.R. Pt. 23, Subpt. D, App. A.

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[2] Section 8(a)(5) of the Small Business Act provides that a "socially disadvantaged individual" is a person who has been subjected to "racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5). Section 8(a)(6)(A) of the Act states that "[e]conomically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A).

Both minority and nonminority firms are eligible for DBE certification. The Small Business Act contains a congressional finding that social and economic disadvantage is "not limited to" the racial and ethnic groups specified in the statute and regulations. 15 U.S.C. 631(f)(1)(C). Individuals who are not members of the designated minority groups will not be presumed to suffer from social and economic disadvantage, but they may establish such disadvantage by satisfying criteria set forth in the DOT regulations. See 49 C.F.R. Pt. 23, Subpt. D, App. A. As the regulations explain, persons such as

> disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate * * * that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive groups.

Ibid.

In order to demonstrate social disadvantage on an individualized basis, "[t]he individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control." 49 C.F.R. Pt. 23, Subpt. D, App. C. Criteria for determining social disadvantage include assessments of an individual's education, employment experiences, and business history. *Ibid.* An individual may establish economic disadvantage by demonstrating that his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same

or similar line of business and competitive market area who are not socially disadvantaged." *Ibid.*

4. Petitioner is a licensed electrical contractor and bids on federally-funded construction contracts in Utah. It is not a "small" business because its annual gross revenues of approximately $41 million exceed the maximum allowed by statute and by DOT's implementing regulations. Pet. App. 4, 20; Pet. 8. Petitioner's owners are not members of any of the groups that are presumed to be disadvantaged under ISTEA and the accompanying regulations. Pet. App. 4, 20.

In 1995, petitioner submitted bids to the prime contractors for the electrical work to be done on two federally-funded projects. Petitioner submitted the lowest bid for each project. On each occasion, however, the prime contractor that was awarded the contract by UDOT awarded the electrical subcontract to a DBE that submitted the next lowest bid. Each of the prime contractors stated that it would have awarded the subcontract to petitioner if the DBE provisions had not been in place. Pet. App. 4-5.

5. Petitioner filed suit against UDOT, alleging that UDOT's DBE program discriminates on the basis of race and gender in violation of the Equal Protection Clauses of the Fifth and Fourteenth Amendments. The United States Department of Transportation intervened as a defendant.

On cross-motions for summary judgment, the district court dismissed petitioner's suit for lack of jurisdiction. Pet. App. 16-27. The court held that petitioner lacked standing to sue because it had failed to demonstrate that its alleged injury was caused by the challenged statutory and regulatory provisions, and that a favorable decision regarding the constitutionality of those provisions would redress petitioner's alleged harms.

Id. at 22-26. The court explained that a business would have standing to challenge the provisions defining social and economic advantage only if it could "show that it is otherwise qualified to participate in the program and is prevented from doing so by the challenged discriminatory policies." *Id.* at 23. It concluded that petitioner could not make that showing because its gross receipts were too great to permit it to qualify as a "small" business. *Id.* at 22-23, 26.

Petitioner contended that it would benefit from invalidation of the race- and gender-based presumptions despite the fact that its size independently precluded it from participating in the DBE program. Petitioner argued that invalidation of those presumptions would cause fewer businesses to qualify for the DBE program, thereby forcing contractors and the UDOT to request waivers from the federal requirements and increasing competitive opportunities for petitioner. Pet. App. 23. The district court found that postulated chain of events to be "too speculative to support the direct causal link necessary to support [petitioner's] standing." *Id.* at 24.

6. The court of appeals affirmed. Pet. App. 1-13. The court stated that petitioner was injured by the DBE provisions taken as a whole because it was prevented from competing on an equal basis with businesses classified as DBEs. *Id.* at 6-7. It held, however, that petitioner lacked standing to challenge ISTEA's race- and gender-based presumptions because a judicial decision invalidating those presumptions would not redress petitioner's injury. *Id.* at 7-13.[3]

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[3] The court of appeals noted that "[t]raditionally, redressability and traceability overlap as two sides of a causation coin," Pet. App. 7 (quoting *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)), and it assumed "for the sake of

The court of appeals first explained that the challenged presumptions are severable from the remainder of the statute. Pet. App. 9-11. It observed that an allegedly unconstitutional statutory provision will ordinarily be treated as severable unless it is evident that Congress would not have enacted the remainder of the law absent the challenged provision. *Id.* at 9 (citing *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)). The court stated that "the basic intent of [ISTEA] is to foster growth in small businesses owned by 'socially and economically disadvantaged people.'" Pet. App. 9. The court emphasized that a small business entity may qualify as "socially and economically disadvantaged" *either* "by relying on the race- or gender-based presumption of such disadvantage" *or* "by satisfying the race- and gender-neutral criteria established in the statute and amplified in the regulations." *Ibid.* Based on "the statutory race- and gender-neutral methods of establishing social and economic disadvantage," the court of appeals found it "clear that the legislative intent to foster development in small businesses whose owners have had to overcome social and economic hardship would remain even in the absence of the challenged presumption." *Id.* at 10. The court found that conclusion to be buttressed by the legislative history of the Small Business Act and ISTEA. *Id.* at 10-11.

The court of appeals acknowledged that petitioner might be able to establish standing despite the severability of the challenged race- and gender-based presumptions if it could show "that the practical effect

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argument that [petitioner] has established that its injury is 'fairly traceable' to the DBE program and its race and gender preferences," *id.* at 8.

of eliminating the presumption would be some meaningful reduction in the number of DBEs against which it would be forced to compete." Pet. App. 12. The court cautioned, however, that "at summary judgment, it is a plaintiff's burden to adduce evidence sufficient to establish necessary jurisdictional facts," and that petitioner "may not establish standing by merely hypothesizing that elimination of the presumption would improve its terms of competition." *Ibid.* The court concluded that petitioner had failed to satisfy its burden because "the record before [the court] includes no evidence that any DBEs would be disqualified as a result of eliminating the presumption." *Ibid.*[4]

ARGUMENT

The court of appeals' decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to

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[4] The court explained:

> [T]he record does contain a list of businesses that UDOT has certified as DBEs. The record, however, is silent on whether those subcontractors relied on the disputed presumption, the race- and gender-neutral criteria, or both to receive such certification. In fact, there is no evidence that any other subcontractors against whom [petitioner] competes would lose their DBE status as a result of eliminating the presumption. [Petitioner] has therefore made no showing that an improvement in its terms of competition for subsequent contracts would likely result from a substantive adjudication in its favor.

Pet. App. 13.

identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). To satisfy the requirements of Article III, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Article III thus requires a plaintiff to demonstrate that he "stand[s] to profit in some personal interest" by a judgment in his favor, *Allen* v. *Wright*, 468 U.S. 737, 766 (1984) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976)), thereby ensuring that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). This Court's "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

2. Petitioner contends that UDOT's use of the race- and gender-based presumptions of social and economic disadvantage mandated by ISTEA is unconstitutional. Pet. App. 1-2. Even if those presumptions were held to be unlawful, however, petitioner would be ineligible to participate in the DBE program because its annual gross revenues of approximately $41 million exceed the maximum allowed by ISTEA and DOT's implementing

regulations. *Id.* at 4; Pet. 8.[5] The district court was therefore correct in holding that any injury petitioner may suffer as a result of the DBE program "is fairly traceable only to that aspect of the program that limits participation based on [petitioner's] financial status." Pet. App. 22.

The existence of an independent (and unquestionably constitutional) barrier to petitioner's participation in the DBE program distinguishes this case from the decisions on which petitioner relies. The plaintiff in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), was a "small business" within the meaning of the relevant statutory and regulatory provisions. See No. 93-1841 (*Adarand*) Tr. Oral Arg. 3 (counsel for Adarand states that "[i]n the year surrounding the events that led to this action, Adarand's annual average gross receipts were approximately $900,000"). The same was true of the plaintiff in *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997). See *Dynalantic Corp.* v. *United States Dep't of Defense*, 937 F. Supp. 1, 2 (D.D.C. 1996).[6] In *Northeastern Florida*

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[5] The DOT regulations state that "[b]efore making any determination of social and economic disadvantage, the recipient [of federal funds] should always determine whether a firm is a small business concern. If it is not, then the firm is not eligible to be considered a disadvantaged business, and no further determinations need be made." 49 C.F.R. Pt. 23, Subpt. D, App. C. Thus, if petitioner were to apply for DBE certification, its application would be rejected without consideration of the race or gender of its owners.

[6] Neither the *Adarand* Court nor the D.C. Circuit in *Dynalantic* explicitly based its disposition of the standing issue on the fact that the plaintiffs in those cases were "small" businesses. Because both Adarand and Dynalantic *were* small businesses, however, neither the government (in its briefs) nor the reviewing courts were called upon to address the question whether a plaintiff that

Chapter of the Associated General Contractors of America v. *City of Jacksonville*, 508 U.S. 656 (1993), the plaintiff contractor association challenged a municipal ordinance setting aside for "Minority Business Enterprises" 10% of the amount spent on city contracts. *Id.* at 658. Nothing in the Court's opinion suggests that the association's members were ineligible to bid on the relevant contracts on any ground other than race; to the contrary, the Court assumed the truth of petitioner's allegation "that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." *Id.* at 668. And in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the defendant university conceded its inability to prove that the plaintiff would not have been admitted to the school even if racial factors had not been considered. See *id.* at 408-410 (opinion of Stevens, J.).

Petitioner cites no case holding that a person who is independently ineligible for a particular public benefit may sue to challenge purported discrimination in the criteria by which the benefit is awarded.[7] Thus, peti-

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did not satisfy the size limitation for DBEs would have standing to challenge the use of race- and gender-based presumptions in the DBE certification process.

[7] This Court has held that a plaintiff who alleges unlawful discrimination in the process by which public benefits are awarded need not allege in his complaint, or prove at trial, that he would have received the benefit if not for the purported discrimination. See, *e.g.*, *Northeastern Florida*, 508 U.S. at 666. The Court has not suggested, however, that such a suit may properly be brought by a plaintiff who is demonstrably ineligible for the benefit on independent, unchallenged grounds. For example, if a high school diploma is an absolute prerequisite to entrance into a particular college, an individual who is not a high school graduate surely could not sue to challenge the college's race-conscious admissions

tioner's inability to meet the applicable size limitation precludes adjudication of its challenge to the use of race- and gender-based presumptions in the DBE certification process.

3. Petitioner also contends that invalidation of the challenged race- and gender-based presumptions would lead to the elimination of the DBE program, or at least to a significant reduction in its scope, increasing petitioner's competitive opportunities and thereby redressing its injury. That argument provides no basis for finding that petitioner has standing to bring this suit. Insofar as petitioner contends that the challenged presumptions are not severable from the remainder of the statutory scheme, its claim is wrong as a matter of law. Insofar as petitioner argues that invalidation of the presumptions would substantially reduce the number of DBEs certified by the UDOT, the court of appeals correctly held that petitioner failed to present any evidence to substantiate its claim.

a. "A court should refrain from invalidating more of the statute than is necessary. Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (brackets, ellipsis, and internal quotation marks omitted). Thus, "[u]nless it is evident that the Legislature would not have enacted those provisions

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policies simply by asserting a right to have his application considered (and rejected) on the basis of nondiscriminatory criteria. To permit such suits to go forward would subvert the purposes of the "case or controversy" requirement by "convert[ing] the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge*, 454 U.S. at 473 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).

which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Ibid.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam)). The absence of an explicit severability clause in the statute does not create a presumption against severability. *Alaska Airlines*, 480 U.S. at 686.

The court of appeals correctly held (Pet. App. 9-11) that if ISTEA's race-and gender-based presumptions were ultimately found to be invalid, those presumptions could appropriately be severed from the remainder of the statute, leaving in place the preference for "socially and economically disadvantaged" small businesses. Compare *INS* v. *Chadha*, 462 U.S. 919, 931-935 (1983) (recognizing that severability of challenged statutory provision may be relevant in determining whether a favorable judicial ruling would redress the plaintiff's injury). The Small Business Act states that it is the "policy of the United States that small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. 637(d)(1) (Supp. II 1996). The Act contains race-neutral definitions of the terms "[s]ocially disadvantaged individuals" and "[e]conomically disadvantaged individuals." 15 U.S.C. 637(a)(5) and (a)(6)(A) (quoted in note 2, *supra*). Section 1003(b) of ISTEA provided that "not less than 10 percent of the amounts authorized to be appropriated under [other provisions of the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 105 Stat. 1919.

Although Congress determined that the statutory goals could best be achieved by treating women and members of specified racial and ethnic groups as presumptively disadvantaged (see p. 4, *supra*), petitioner offers no basis for concluding that Congress would have abandoned the effort to assist small businesses owned and operated by disadvantaged individuals if it had believed those presumptions to be impermissible. The justification for the challenged race- and gender-based presumptions is simply that membership in the specified groups was thought to bear a significant correlation to social disadvantage. See H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 21 (1978) ("in many * * * cases status as a minority can be directly and unequivocally correlated with social disadvantagement"). The statutory preference for socially and economically disadvantaged small-business owners would be fully capable of "functioning independently," *Alaska Airlines*, 480 U.S. at 684, however, even if that correlation were determined to be a constitutionally insufficient justification for the challenged presumptions. As the court of appeals recognized, the text and history of the pertinent statutory provisions indicate "that the legislative intent to foster development in small businesses whose owners have had to overcome social and economic hardship would remain even in the absence of the challenged presumption." Pet. App. 10. Since a DBE program without presumptions clearly would foster economic development in small businesses owned by minorities and women, as well as in firms owned by other "socially and economically disadvantaged" persons, the court of appeals correctly concluded that the presumptions are severable.

Petitioner's claim (see Pet. 9-13) of a conflict in authority on this point is unpersuasive. None of the

cases cited by petitioner holds that the challenged race- and gender-based presumptions are inseverable from the remainder of the statutory scheme.[8] Rather, petitioner relies on decisions recognizing that the remediation of past racial discrimination is a central objective of the DBE program. That proposition is beyond dispute. But those cases do not establish that Congress had no other objective, as it clearly did, in view of the fact that under the pertinent statutory and regulatory provisions, an individual may demonstrate that he is "socially and economically disadvantaged" even if he is not a member of one of the groups identified as presumptively disadvantaged. See pp. 5-6, *supra*. Nor do petitioner's cases establish that Congress would have abandoned its effort to remedy past race discrimination if the challenged presumptions were eliminated, and there is no reason to think that it would, in view of the fact that many individuals certified as "socially and economically disadvantaged" on the basis of the challenged presumptions could alternatively establish disadvantage based on an individualized inquiry if the presumptions were eliminated. There is consequently no conflict between the proposition that the DBE program serves in part to remedy past racial discrimina-

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[8] Petitioner's reliance (see Pet. 24-25) on the D.C. Circuit's decision in *Dynalantic* is misplaced. The *Dynalantic* court stated in passing that it could not "assume," at the pleading stage of the litigation, "that Congress would have enacted [Section 8(a) of the Small Business Act] without its race-conscious theme or that it would, if the statute were held unconstitutional, commit itself to a program of the same scale directed only to the economically disadvantaged without regard to race." 115 F.3d at 1017. The court did not purport to issue any holding, however, regarding the severability of any provision of the Small Business Act, and it did not address ISTEA at all.

tion, and the court of appeals' conclusion in this case that Congress would likely wish to continue the DBE provisions in effect even in the absence of the challenged race- and gender-based presumptions.

b. Notwithstanding the severability of the challenged race- and gender-based presumptions from the remainder of the statutory scheme, the court of appeals acknowledged that petitioner might be able to establish standing in this case if it could show that "the practical effect of eliminating the presumption would be some meaningful reduction in the number of DBEs against which it would be forced to compete." Pet. App. 12. The court concluded, however, that petitioner had presented "no evidence that any other subcontractors against whom [petitioner] competes would lose their DBE status as a result of eliminating the presumption." *Id.* at 13.[9] Because petitioner had "made no showing that an improvement in its terms of competition for subsequent contracts would likely result from a substantive adjudication in its favor," the court held that petitioner had failed to demonstrate its standing to sue. *Ibid.* That holding is correct and raises no issue warranting this Court's review.[10]

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[9] In particular, the court of appeals noted the absence of record evidence as to whether the particular DBE against whom petitioner had previously competed (see p. 6, *supra*) would have been certified absent the challenged presumptions. See Pet. App. 12-13.

[10] Petitioner contends (Pet. 13 n.14) that the court of appeals' holding imposes "impenetrable barriers" to plaintiffs seeking to challenge the constitutionality of the DBE provisions. Petitioner did not raise any such argument in the court of appeals, however, despite the fact that the district court had rejected, as unduly speculative, petitioner's contention that invalidation of the challenged presumptions would have the practical effect of reducing the scope of the DBE program. See Pet. App. 23-26. In any event,

The nature and extent of a plaintiff's burden as to standing vary depending on the stage of litigation. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 167-168 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992). At the pleadings stage, the burden of alleging that injury is "fairly traceable" to the defendant's conduct and likely to be redressed by a favorable decision is "relatively modest." *Bennett*, 520 U.S. at 171. At that early stage, general allegations, including those relating to standing, are presumed to be both true and inclusive of the facts necessary to support a claim. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 118 S. Ct. 1003, 1017 (1998); *Bennett*, 520 U.S. at 168; *Defenders of Wildlife*, 504 U.S. at 561; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990). In opposing a motion for summary judgment, however, a "plaintiff can no longer rest on such 'mere allegations.'" *Defenders of Wildlife*, 504 U.S. at 561. Rather, it "must 'set forth' by affidavit or other evidence 'specific facts,'" *Bennett*, 520 U.S. at 168 (quoting Fed. R. Civ. P. 56(e)), as to each of the three elements of standing.[11]

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petitioner is ill-positioned to contend that the court of appeals' ruling imposes exorbitant evidentiary requirements, since petitioner failed to submit *any* evidence concerning the likely practical effect of a favorable judicial ruling.

Insofar as petitioner disputes the court of appeals' characterization of the evidentiary record in this case, that factbound dispute presents no issue of general importance warranting this Court's review. Insofar as petitioner contends that it was not required to introduce evidence regarding the likely practical effects of a favorable ruling, its argument is wrong for the reasons stated below.

[11] The Court has also recognized that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562

In light of petitioner's failure to introduce *any* evidence as to the likely consequences of a judicial order invalidating the challenged race- and gender-based presumptions, the court of appeals correctly upheld the district court's grant of summary judgment. See Pet. App. 12-13. Contrary to petitioner's contention (see Pet. 21-24, 25-26), the court's holding as to redressability does not conflict with that of the D.C. Circuit in *Dynalantic*.[12] The court in *Dynalantic* was reviewing the district court's decision to dismiss on the pleadings, see 115 F.3d at 1014, and it recognized its obligation to "[t]ak[e] Dynalantic's allegations at this stage in the litigation as true," *id.* at 1018. The court had no occa-

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(quoting *Allen*, 468 U.S. at 758; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975)). "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps the response of others as well." *Defenders of Wildlife*, 504 U.S. at 562. It then "becomes the burden of the plaintiff to adduce facts showing that those choices [of third parties] have been or will be made in such manner as to produce causation and permit redressability of injury." *Ibid.*

In the instant case, while petitioner competes for government construction contracts, it is not directly affected by the race- and gender-based presumptions used in certifying DBEs, since it is independently ineligible (based on its size) for inclusion in the DBE program. Petitioner's claim of redressability ultimately depends on predictions concerning the manner in which third parties not before the Court would likely act if the race- and gender-based presumptions were held to be invalid. This Court has shown a consistent reluctance to allow such predictions to serve as the predicate for standing in the absence of firm evidence establishing their accuracy. See, *e.g.*, *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 42-46.

[12] The other court of appeals' decisions cited at page 27 of the petition do not address standing.

sion to discuss the quantum of evidence concerning redressability that would be required to withstand a motion for summary judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
MARK L. GROSS
LISA J. STARK
Attorneys

NANCY E. MCFADDEN
General Counsel
U.S. Department of Transportation

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No. 98-579

In The

Supreme Court of the United States

October Term, 1998

CACHE VALLEY ELECTRIC COMPANY,

Petitioner,

v.

STATE OF UTAH DEPARTMENT OF TRANSPORTATION; CHARLES K. "CHUCK" LARSON, its civil rights manager; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO FEDERAL RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM PERRY PENDLEY*
*Counsel of Record
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street
Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

1. Whether the racial preferences in STURAA (§ 106(c)), ISTEA (§ 1003(b)), and TEA-21 (§ 1101(b)) are severable from those provisions?

2. Whether the challenging subcontractor, in order to demonstrate redressability, must demonstrate that those who qualified as DBEs under the racial presumption would not have qualified in its absence; or whether the Tenth Circuit panel erred in presuming what it had severed on account of unconstitutionality, that is, that all persons in the presumptive racial categories had been subjected to discrimination on account of their race until proven otherwise by a challenger to that status?

3. Whether the challenging subcontractor must demonstrate that it is a "small business concern" to establish standing to challenge STURAA (§ 106(c)), ISTEA (§ 1003(b)), and TEA-21 (§ 1101(b)), or whether its inability to compete on an equal constitutional footing is its injury?

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INTRODUCTION

On November 25, 1998, the United States District Court for the Western District of Texas, San Antonio Division, issued an order denying a motion for a preliminary injunction in *Rothe Development Corporation v. The United States Department of Defense, et al.* (Civil Action No. SA-98-CV-1011-EP). Rothe, a Texas corporation, challenged the constitutionality of the federal race-based contracting program that caused the contract on which it had submitted the lowest bid to be awarded to a competitor entitled to the race-based preference.

Before ruling on the motion for preliminary injunction, the District Court addressed "whether Rothe has standing to bring this suit." In so doing, the Court noted "[t]he government argues that. . . . [e]ven if the presumption of social disadvantage for racial minorities were removed. . . . Rothe would not be eligible for the preference. . . . " Therefore, "[a]ccording to the government, Rothe lacks such standing." In making its argument, "the government" (Respondent here) drew the Court's attention to the holding of the United States Court of Appeals for the Tenth Circuit in *Cache Valley Elec. Co. v. State of Utah Department of Transportation*, 149 F.3d 1119 (10th Cir. 1998).

In *Rothe*, the District Court rejected the Tenth Circuit's holding in *Cache Valley* and instead adopted the holding of the District of Columbia Circuit in *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997). The Court noted that "[t]he D.C. Circuit has rejected [the] reasoning" of the Tenth Circuit. Thus, less than two months after the filing of this Petition, a federal

district court recognized that, on the issues presented here, there exists a split in the circuits. In fact, according to the District Court, the holding of the Tenth Circuit in *Cache Valley* is in conflict with the holding of this Court in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995).[1]

Just as importantly for the purposes of this Petition, the Federal Respondent recognizes that there is a split in the circuits, a split that Respondent seeks to exploit by asking the District Court in *Rothe* to adopt the holding of the Tenth Circuit in *Cache Valley*. It is readily apparent that Respondent will continue to urge upon the lower courts the holding adopted by the Tenth Circuit in *Cache Valley*, notwithstanding its true, direct, intolerable, and irreconcilable conflict with the holdings of this Court in *Adarand* and in *Northeastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993). For this reason alone this Court should grant the petition.[2] Moreover, as set forth below, Respondent has failed

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[1] "As the Supreme Court noted in *Adarand*, the claimed injury is not the loss of a contract, but the inability for a non-minority bidder to bid under a fair and constitutional scheme. This is sufficient to establish standing." *Rothe*, Slip Op. at 5.

[2] In response to a question posed by U.S. Senator John Ashcroft (R-Missouri) as to when Federal Respondent would adhere to the holding of the U.S. Supreme Court in *Adarand*, the General Counsel of the U.S. Department of Transportation responded, "I think, certainly, if the Supreme Court of the United States said that our specific program was unconstitutional, we would not continue it." *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand*, Committee on the Judiciary, Subcommittee on the Constitution, Federalism, and Property Rights, Senate Hearing 105-477 (September 30, 1998), Serial No. J-105-53. This Petition presents

to raise a single sustainable argument as to why this Petition should not be granted.

I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT.

A. THE CONFLICT BETWEEN THE FACTUAL HOLDINGS OF THE TWO CIRCUITS IS MANIFEST AND IRRECONCILABLE.

Respondent boldly asserts that the Tenth Circuit's "decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals." Federal Respondent's Brief, at p. 9. Nonetheless, Respondent addresses two factual holdings of the Tenth Circuit that place the Tenth Circuit in direct and intolerable conflict with the District of Columbia Circuit.

Although the Tenth Circuit held in *Cache Valley* that the legislative history of the federal race-based highway program challenged there supported the Court's view that the race-based presumption could be severed from the statute, the District of Columbia Circuit held just the opposite in *Dynalantic*. Contrary to the assertions of Respondent, the *Dynalantic* Court's holding was no mere "passing" reference, but a thoughtful review of the statutory program at issue.[3] Held the Court, "We think the

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an opportunity to resolve the questions Respondent appears to have regarding this Court's earlier holdings on this subject.

[3] Notwithstanding Respondent's aside as to what the *Dynalantic* Court "assume[d]," it is Respondent and the *Cache*

government's statutory analysis [that the federal statute is not race conscious] is rather dubious." *Dynalantic*, at p. 1017. And, although Respondent points out that the *Dynalantic* Court did not address ISTEA, Section 1003(b), 105 Stat. 1919, had the Court addressed TEA-21, Section 1110(b), Public Law 105-178, the successor to ISTEA, the factual basis for its holding would have been strengthened because Congress, in adopting TEA-21, specifically declined to adopt the race-neutral substitute offered by

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Valley court that engage in not one, but two, incredible assumptions. First, Respondent and the *Cache Valley* Court assume, notwithstanding all the race-remediation language from the legislative history of STURAA, Section 106(c), 101 Stat. 145, ISTEA, and TEA-21 that Congress, denied the race-based presumption, would have enacted yet another small business program. Second, Respondent and the *Cache Valley* court engage in the very presumption that they propose to sever due to its unconstitutionality, that is, that persons who are presumptively "disadvantaged" have suffered discrimination.

In addition to those flawed assumptions, Respondent and the *Cache Valley* Court place the burden on Petitioner to demonstrate that persons qualified under this very unconstitutional presumption are not disadvantaged through discrimination. Neither the Tenth Circuit nor Respondent may assume, in the absence of a strong basis in evidence, that discrimination exists merely as a result of membership in a group, nor may they impose on Petitioner the unconstitutional burden of proving to the contrary. It is little wonder that the District of Columbia Circuit rejected these assumptions, thus creating the direct and intolerable conflict that now exists between these circuits.

Senator McConnell.[4] The conflict between the circuits regarding the severability of the race-based presumption must be resolved by this Court.

Respondent points as well to the factual holding of the Tenth Circuit panel in *Cache Valley* that elimination of the race-based presumption would not benefit Petitioner. Yet this holding is in direct and irreconcilable conflict with the holding of the District of Columbia Circuit in *Dynalantic*, where the Court took judicial notice of the fact that "over 99% of the firms qualified as a result of race-based presumptions." *Id.* at p. 1017. The *Dynalantic* Court would not conclude, as did the *Cache Valley* Court, that those qualified under a racial presumption of discrimination for the group to which they belong were actually, and personally, victims of discrimination resulting in social and economic disadvantage without a strong basis in evidence for that finding. The *Dynalantic* Court correctly placed the burden on the government to demonstrate that any of those presumptively qualified as a DBE as result of group membership alone were personally the victims of discrimination because of that group membership, resulting in social and economic disadvantage.

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[4] 144 Cong. Rec. S1465-1467 (March 5, 1998). Respondent seeks to, but may not, have it both ways. Respondent may not, in an attempt to meet the "strict scrutiny" test, assert that compelling governmental interest is shown by the lengthy legislative record in support of the race-based program and then, in an attempt to deny a litigant standing by severing the race-based provision, assert that Congress was not seeking to engage in racial remediation.

Thus, there is a true, direct, intolerable, and irreconcilable conflict between the Tenth Circuit and the District of Columbia Circuit concerning this conclusion and the burden of proof associated therewith.

B. THE CONFLICT BETWEEN THE LEGAL HOLDINGS OF THE TWO CIRCUITS IS MANIFEST AND IRRECONCILABLE.

Respondent's attempt to rewrite the opinion of the District of Columbia Circuit in *Dynalantic* must be rejected. For despite Respondent's assertions that Dynalantic was a "small" business, and therefore able to challenge the race-based presumption of the program, that was not the basis for the District of Columbia Court's holding. In fact, the *Dynalantic* Court went out of its way to reject the assertions of the government that Dynalantic was not an "appropriate plaintiff" because it could not participate in the program.[5] The *Dynalantic* Court could not have been more clear as to its view that the government's argument was "premised on a mischaracterization of Dynalantic's alleged injury. [Dynalantic] has no desire to participate in the 8(a) program." *Id.*, at p. 1016. It is little wonder, therefore, that Respondent totally ignores

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[5] Respondent's assertion (in footnote 6) that it did not have the opportunity to challenge the impact of size on standing in the *Dynalantic* case is incorrect. The District of Columbia Circuit made it clear that the ability of Dynalantic to "qualify for the 8(a) program . . . is wholly irrelevant." *Id.*, at p. 1016. Because the Court rejected the government's assertion that Dynalantic did not have standing because it was not "socially *or* economically" disadvantaged, the Court would have rejected a similar standing argument based on Dynalantic's size. *Id.*

this forthright holding and the direct and irreconcilable conflict it creates with the holding of the Tenth Circuit in *Cache Valley*.[6] This direct and irreconcilable conflict must be resolved by this Court.

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND THE DECISIONS OF THIS COURT.

Respondent's failure to discuss the holding of the *Dynalantic* Court cannot obscure the fact that that decision was based on the holdings of this Court in *Adarand*, *Jacksonville*, and *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). As a result, the Tenth Circuit's decision in *Cache Valley* creates a direct and irreconcilable conflict, not only with District of Columbia Circuit, but also with this Court. This conflict must be resolved by this Court.[7]

Respondent attempts to brush aside that conflict by asserting that this Court's holding in *Adarand* was silent as to the significance of size in challenges such as this. Obviously, to everyone but Respondent and the Tenth

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[6] Just how much of a conflict exists between the Tenth Circuit and the District of Columbia Circuit is obvious from Chief Judge Edwards' dissenting opinion in *Dynalantic*. Chief Judge Edwards' analysis is exactly that adopted by the Tenth Circuit in *Cache Valley*!

[7] Congress all but invited expeditious review by this Court of the TEA-21 program. Among the indicia of that near invitation was the adoption of a provision that any state barred by court order from implementing the race-based provisions of TEA-21 would not lose its federal funds as a result.

Circuit, this Court's holdings in *Bakke*, *Jacksonville*, and *Adarand* made that discussion totally unnecessary. Lest others become as confused as Respondent is on this issue, this Court must grant this Petition to clarify this matter once and for all.[8] Otherwise, the result of what Respondent sees as the Court's silence on this matter will be adoption of a standing rule that is radically different from that adopted in *Bakke* and that has guided the courts for more than 20 years.

CONCLUSION

For all of the above reasons, this Court should grant the Petition of Cache Valley in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit. Respondents have failed to provide

[8] Similarly confused is Respondent's discussion of the burden as to standing. Federal Respondent's Brief, at p. 18. Respondent carelessly mingles plaintiff's burden to prove standing with the burden to withstand summary judgment. This discussion should not obscure the conflict that exists between the Tenth Circuit and the District of Columbia Circuit and this Court with regard to who has standing to challenge federal race-based contracting programs such as the one at issue in this case. Respondent's assertion that Petitioner is a mere "concerned bystander[ ]" with regard to this program is shameful. [footnote 7]. Petitioner, and other companies like it, continue to suffer constitutional injury and economic hardship as a result of this program.

any compelling reason as to why this petition should not be granted.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
*Counsel of Record
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

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In The

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CACHE VALLEY ELECTRIC COMPANY,

Petitioner,

v.

STATE OF UTAH DEPARTMENT OF TRANSPORTATION; CHARLES K. "CHUCK" LARSON, its civil rights manager; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL BRIEF

WILLIAM PERRY PENDLEY*
*Counsel of Record
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street
Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In footnote 1 of its Petition for *Writ of Certiorari*, Cache Valley Electric Company informed the Court that in a case related to the holding of the U.S. Court of Appeals for the Tenth Circuit in *Cache Valley Electric Company v. State of Utah, et al.*, 149 F.3d 1119 (10th Cir. 1998), that is, *Adarand Constructors, Inc. v. Slater* (97-1304), the United States had moved to dismiss *Adarand* on grounds of mootness. On March 6, 1999, a panel of the Tenth Circuit, in an opinion written by Judge Carlos F. Lucero, ruled that *Adarand* is moot and ordered the federal district court to vacate its earlier decision that the federal race-based contracting program is unconstitutional. A copy of that decision is attached as the Appendix.[1]

Cache Valley advised the Court of the pending motion by the United States in *Adarand* pursuant to Cache

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[1] In June 1997, in *Adarand Constructors, Inc. v. Peña*, Judge Kane held the federal highway DBE program to be unconstitutional for lack of narrow tailoring. 965 F. Supp. 1556 (D. Colo. 1997). In July 1997, in *Adarand v. Romer*, Civ. No. 97-K-1351, Judge Kane, taking judicial notice of his ruling in *Adarand v. Peña*, held that Adarand lacked standing because it had been subjected to unconstitutional racial discrimination and was therefore eligible for certification as "disadvantaged." As a result of that ruling, the State of Colorado certified Adarand as a "disadvantaged business enterprise." The United States has stated that it will be required to determine if Colorado properly certified Adarand as a DBE. Furthermore, during oral arguments at the Tenth Circuit, the United States declined to advise the Court that it would never decertify *Adarand*, though invited to do so by the Court.

Valley's contention that the result of the Tenth Circuit's ruling in *Cache Valley* is that "anyone who seeks to challenge the federal highway D[isadvantaged] B[usiness] E[nterprise] program addressed in *Adarand* lacks standing . . . " Petition, p. 28. At the time that Cache Valley filed its petition, only *Adarand* had standing, as a result of the holding of this Court in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), to challenge the federal highway DBE program. Now the Tenth Circuit has held that even Adarand lacks standing to challenge the federal DBE program.

At this time, no party who has suffered disadvantage as a result of the application of the arguably unconstitutional federal statute at issue in this case may bring a challenge to that statute in the six States that constitute the Tenth Circuit. Neither Cache Valley nor any entity or individual similarly situated may bring such a challenge as a result of Judge Lucero's holding in *Cache Valley*. Now, as result of Judge Lucero's holding in *Adarand*, standing has been denied to Adarand as well; furthermore, the decision of the district court in *Adarand* must now be vacated.

Nearly four years after this Court's holding in *Adarand*, nothing remains of this Court's remand. The original decision of the district court as a result of this Court's remand has been vacated, and all other entities and individuals have been barred from bringing the very challenge approved of by this Court in *Adarand*.

The Petition of Cache Valley in this matter should be granted.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
*Counsel of Record
J. SCOTT DETAMORE
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

Dated: March 10, 1999

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff - Appellee,

v.

RODNEY E. SLATER, Secretary of the Department of Transportation; KENNETH R. WYKLE, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, engineer of the Central Federal Lands Highway Division,

Defendants - Appellants

PACIFIC LEGAL FOUNDATION; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

No. 97-1304

(Filed March 4, 1999)

Appeal from the United States District Court for the District of Colorado (D.C. No. 90-K-1413)

Leslie A. Simon, Department of Justice (Mark L. Gross, Department of Justice; Nancy E. McFadden, General Counsel, Paul M. Geier, Assistant General Counsel for Litigation, Sara McAndrew, Trial Attorney, Edward V.A. Kussy, Acting Chief Counsel, Federal Highway Administration, Department of Transportation; Isabelle Katz Pinzler, Acting Assistant Attorney General; Thomas E. Perez, Deputy Assistant Attorney General; and William R. Yeomans, Acting Deputy Assistant Attorney General, with her on the briefs), Washington, D.C., for Defendants – Appellants.

William Perry Pendley (Todd S. Welch, with him on the brief), Mountain States Legal Foundation, Denver, Colorado, for Plaintiff – Appellee.

Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief.

William C. McNeill, III and Julian A. Gross for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie A. Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

Before **LUCERO**, **McKAY** and **MURPHY**, Circuit Judges.

LUCERO, Circuit Judge.

This case began when plaintiff Adarand Constructors, Inc., challenged the constitutionality, under the Equal Protection Clause of the Fifth Amendment, of certain subcontractor compensation clauses (SCCs) used by the Department of Transportation to enhance government contracting opportunities for small businesses that are owned and controlled by socially and economically disadvantaged individuals. A panel of this court previously upheld these same SCCs under "intermediate scrutiny." *See Adarand Constructors, Inc. v. Skinner*, 16 F.3d 1537 (10th Cir. 1994) (*Adarand II*).[1] Holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," the Supreme Court reversed, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 237 (1995) (*Adarand III*) (overruling *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)), and remanded the case to district court for a determination of whether the SCCs are narrowly tailored to serve a compelling governmental interest. Applying strict scrutiny, the district court granted

[1] Appellants are sued in their official capacities. The caption in this case has thus been amended to incorporate the substitution of Rodney E. Slater as Secretary of Transportation and Kenneth R. Wykle as Administrator of the Federal Highway Administration, pursuant to Fed. R. App. P. 43(c)(1).

summary judgment for plaintiffs. *See Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997) (*Adarand IV*).

The government now appeals, arguing that the district court incorrectly found that the subcontractor compensation clause (SCC) program was not sufficiently narrowly tailored to a compelling governmental interest as to survive strict scrutiny. Additionally, the government argues that the district court erred in ruling the use of the SCC program to be unconstitutional not only in the direct federal contracting program administered by the Department of Transportation, but also in federal aid programs operated by the State of Colorado with federal financial assistance. However, as we find this case has become moot, we do not resolve those issues, but rather remand and direct the district court to vacate its judgment below, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

I

The facts of this case and the program at issue have been set out in numerous judicial opinions, *see, e.g., Adarand III*, 515 U.S. at 205-10, and we need not repeat them in detail. The essential matter relevant to our disposition is that Adarand seeks declaratory and injunctive relief against the use of SCCs that provide additional compensation to federal government contractors employing subcontractors that qualify as Disadvantaged Business Enterprises (DBEs). The company claims that the various routes to DBE certification incorporate impermissible presumptions of social disadvantage based on race.

The Supreme Court held that Adarand alleged a concrete and particularized injury sufficient to grant standing to pursue its challenge, in that the classification at issue "prevent[s] the plaintiff from competing on an equal footing." *Id.* at 211 (quoting *Northern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667 (1993)). The Court held Adarand's injury sufficiently actual or imminent to satisfy standing requirements because Adarand had shown that it was "very likely" to bid, within a year, on another federal contract offering incentives for hiring small disadvantaged subcontractors. *Adarand III*, 515 U.S. at 211.

Since the district court's grant of judgment in this case, however, the Colorado Department of Regulatory Agencies has certified Adarand as a DBE, which certification entitles Adarand to the benefit of the SCC under challenge. The clause at issue provides that "[a] small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration *or by any State's Department of Highways/Transportation.*" *See* Appellant's Br., Addendum 3, at 1 (Federal Lands Highway DBE/WBE Subcontract Compensation Clause) (emphasis added).

The circumstances leading to Adarand's DBE certification are as follows. After issuance of *Adarand IV*, Adarand filed suit against state officials challenging Colorado's use of DBE guidelines in administering federally assisted highway programs. Colorado subsequently modified its DBE regulations to eliminate the presumption of social and economic disadvantage for racial and ethnic minorities, and to condition the social disadvantage

branch of its DBE inquiry solely on the applicant's certification that he or she is socially disadvantaged.

Following this modification, the district court denied Adarand's motion for a preliminary injunction for lack of standing. The court apparently reasoned that as a result of the SCC program and the racial presumptions employed in awarding DBE status, Randy Pech, Adarand's principal, had been socially disadvantaged as a white male. According to the court, Adarand Constructors therefore possessed an adequate remedy at law through inclusion in the DBE program, and thus lacked standing to obtain a preliminary injunction against the state's use of the SCC in question. When Adarand applied for DBE status after the court's ruling, Pech certified that he was socially disadvantaged, and Adarand was granted the status.

II

As Adarand is now entitled to the preference it challenges, it can no longer assert a cognizable constitutional injury. "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, ___, 117 S. Ct. 1055, 1067 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). These requirements apply equally to cases on appeal. *See id.* To qualify for adjudication in the federal courts, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* at 1068 (citations omitted). Adarand seeks prospective

relief invalidating the use of the SCC, and must therefore demonstrate a " 'real and immediate threat that [it] would again' suffer similar injury in the future." *Adarand III*, 515 U.S. at 211 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)); *see also Buchwald v. University of New Mexico Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) (concluding that plaintiff has no standing to seek prospective injunction and declaratory relief against consideration of residency in medical school admissions without showing threat of similar injury in future). As a DBE itself, Adarand cannot make that showing, and hence the case before us is moot.

Adarand raises several arguments as to why the case should not be considered moot. First, it argues that it received DBE status only as a result of the decision below, which led the Transportation Commission of Colorado to adopt the DBE policy under which Adarand was subsequently certified. This possibility does not defeat mootness. We have previously held that a city's withdrawal of a policy struck down by a district court rendered plaintiffs's challenge to that policy moot, notwithstanding the fact that the policy had been withdrawn because it had been ruled unconstitutional. *See 19 Solid Waste Dep't Mechanics v. Albuquerque*, 76 F.3d 1142, 1143-44 (10th Cir. 1996). Although the district court's comments in denying Adarand's motion for a preliminary injunction in *Adarand Constructors, Inc. v. Romer* may have prompted Pech's application for DBE status, the dispositive fact for our standing analysis is that he now has that status. Further, Adarand faces no collateral legal consequences from the SCC program. *Cf. Sibron v. New York*, 392 U.S. 40, 57 (1968).

Second, Adarand argues that this case involves actions capable of repetition yet evading review. *See Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975). Adarand contends that if this case is dismissed and the judgment vacated, then the company will be decertified because its status as socially disadvantaged is contingent upon the district court's judgment that the SCC discriminates on the basis of race.[2] The Supreme Court has held that an action for prospective relief can avoid mootness under the doctrine of "capable of repetition yet evading review . . . only in the exceptional situation . . . where the following two circumstances are present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990) (citations and internal quotations omitted). Adarand fails to show that the circumstances of its challenge are too brief for complete litigation. To show a reasonable expectation that it is vulnerable to repetition of the same action by the government. Adarand attempts to draw analogy to the situation of the plaintiff in *Rex v. Owens ex rel. State of Oklahoma*, 585 F.2d 432, 434-35 (10th Cir. 1978), in which we found the involuntary commitment of a patient to a mental institution "on at least four distinct and separate occasions," *id.* at 435, to be capable of repetition yet evading review. We find no indication that Adarand has been or will be subjected to such repetitive action.

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[2] Insofar as this is also an argument against vacating the judgment below, we address it again *infra* Section III.

Adarand's suggestion, made without factual support, that Colorado will continually revoke Adarand's DBE certification, and then reimpose it to avoid review, does not comprise a "reasonable expectation that the plaintiff will be subjected to the same action again." *Id.* Nor are we shown any evidence that the government "manipulated" both Adarand and Colorado into respectively seeking and conferring DBE status, in an effort to establish a repetitive and unreviewable pattern of certification and revocation.

Third, Adarand argues that because its DBE certification is not recognized by the federal government, it is subject to denial of the right to compete equally for federal highway subcontracts in Wyoming and New Mexico. Under the SCC, however, a small business is entitled to DBE treatment "after it has been certified as such . . . by . . . any State's Department of Highways/Transportation." Refusal of certification by other states therefore does not affect Adarand's DBE preference in Colorado – and the use of the SCC in Colorado highway construction is the only issue before us. In any event, the government concedes that the language of the SCC entitles Adarand to the federal subcontracting preference based on any valid certification, regardless of whether it is certified by the particular state in which the highway construction occurs.

Fourth, Adarand argues that because the new Colorado DBE regulations do not comply with federal regulations and might be rejected by the Department of Transportation, Adarand cannot rely on its DBE status to secure the benefits of the federal SCC program. However,

even were it true that the Colorado program is inconsistent with federal regulations, which the government contests, *see* 49 C.F.R. § 23.62 (allowing state DBE programs to certify nonminority individuals on a case-by-case basis), Adarand does not allege a sufficiently particular and concrete injury to grant it standing to challenge the program.[3] The possibility that Adarand faces future injury from the SCC if either Colorado's new program is rejected by the Department of Transportation or Adarand is otherwise decertified is "too conjectural and speculative to avoid a finding of mootness." *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995) (citing *Anderson v. Green*, 513 U.S. 559-60 (1995) (per curiam)).

III

We must also consider whether the circumstances under which this case became moot require us to vacate the judgment of the district court. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Generally, "[w]hen a civil case becomes moot pending appellate

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[3] Adarand reads great significance into a footnote in the government's brief declining to express a view on the merits of Adarand's DBE certification. We cannot, however, view the government's refusal to opine on the merits of an issue not before it as indicative of an intention to take action to revoke Adarand's DBE status. Nor has Adarand shown us that the Department of Transportation could even have authority to do so, save in the event of a third party challenge to Adarand's DBE certification followed by administrative appeal to DOT of Colorado's decision. *See* 49 C.F.R. §§ 23.55, 23.69(b)-(c) (establishing conditions for administrative appeal to DOT of state determinations of third party challenges to DBE status). This possibility is too speculative to create a live controversy.

adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.' " *Arizonans for Official English*, 117 S. Ct. at 1071 (quoting *Munsingwear*, 340 U.S. at 39). The rationale of this "duty" is to prevent a party from being bound by the preclusive effects of a judgment, "review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 39, 40. The Supreme Court has more recently explained that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 518 U.S. 18, 25 (1994).

However, our duty under *Munsingwear* is not an absolute one. Vacatur is an equitable remedy exercised in the interests of fairness. *See id.* In weighing the appropriateness of vacatur, we examine "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* (citing *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)); *see also 19 Solid Waste Dep't Mechanics*, 76 F.3d at 1144-45 (declining to grant vacatur where appellant city mooted case through voluntary withdrawal of policy at issue); *Jones*, 57 F.3d at 923 (granting vacatur when challenged regulations were mooted by intervening legislation).

Although the regulatory change and administrative decision enabling Adarand to gain DBE status were made by Colorado state agencies rather than by the federal government, Adarand argues that this case is nonetheless analogous to cases in which the party seeking vacatur

voluntarily causes or plays an active role in causing the case to become moot. *See, e.g., U.S. Bancorp Mortgage Co.*, 513 U.S. at 27-28 (refusing to vacate where parties settle); *19 Solid Waste Dep't Mechanics*, 76 F.3d at 1144-45 (refusing to vacate where appellant caused mootness). The circumstances causing mootness in this case were precipitated by the actions of a third party and Adarand itself, not by the federal government, and there is no evidence that the government sought mootness in an effort "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 27. We have found vacatur in an analogous case where "mootness . . . resulted not from any voluntary action by plaintiffs but rather from circumstances beyond plaintiffs' control and for which they were not responsible." *Jones*, 57 F.3d at 923 (vacating judgment when plaintiff's suit against members of the Colorado Public Utilities Commission mooted by Colorado legislature's recission of challenged taxicab regulations).

It is true that the third party actions leading to Adarand's receiving DBE status were apparently motivated in some part by the district court's decision at issue here. Consequently, vacatur might conceivably lead Colorado to withdraw Resolution No. TC-554 and return to the policy that Adarand originally challenged, thus depriving Adarand of its judgment below. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 27. The injustice to the appellants and to the public interest occasioned by a contrary result, however, is no less real, and significantly less speculative. Because we cannot address the government's arguments against the judgment below, absent

vacatur, the federal appellants in this case will be bound by a judgment for which they have had no opportunity for appellate review. Furthermore, the federal government will be bound on a matter of great constitutional importance by an unreviewable district court decision, frustrating the public interest in resolution of such matters through prescribed channels of appellate review.

In conclusion, it would be contrary to the "equitable tradition of vacatur" formalized in *Munsingwear* to hold an appellant to the preclusive effects of an adverse judgment when deprived of the opportunity for appellate review through the actions of a third party. Our task is to "dispose[] of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 24 (citations omitted). Although the unusual circumstances of this case make that task a difficult one, we conclude the appropriate course of action in this case is to vacate and remand pursuant to *Munsingwear*. We acknowledge that – while no longer quick – this case does implicate constitutional issues of substantial importance, and that it has suffered a long path through the federal courts. This history does not, however, relieve us of our duty under the Constitution to address only live cases or controversies.

We therefore **VACATE** the judgment below and **REMAND** with directions to dismiss.